Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC.,

Petitioner,

v.

SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a non-Indian corporation, entered into a contract with the Sac and Fox Tribe of the Mississippi in Iowa to provide casino-related investigative and security services after tribal dissidents, in violation of federal and tribal law, seized control of the Tribe's casino. The contract requires arbitration of all disputes arising out of it. For the Tribe, the contract was negotiated and signed by the Walker Council, which was then the Tribe's federally recognized governing body. The Bureau of Indian Affairs had repeatedly refused to recognize the dissidents instead of the Walker Council, and the National Indian Gaming Commission had ordered the casino be closed until the Walker Council regained control of it. Nevertheless, after the dissidents won a tribal election and obtained federal recognition, the Tribe sued petitioner in tribal court, contending that its contract was unauthorized and that petitioner's alleged conduct under the contract was tortious under tribal law.

The questions presented are:

(1) Do the federal agencies' orders establish that the Walker Council had authority to control the casino and enter the contract, such that the Tribe's claims must be arbitrated, not litigated in tribal court?

(2) Does the tribal court lack jurisdiction over the Tribe's claims that petitioner committed tribal-law torts by entering into the casino, investigating the dissidents' illegal operation of the casino, and receiving payments from the Walker Council?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Attorney's Process and Investigation Services, Inc., has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

This case involves an effort by an Indian tribe to use a tribal-court lawsuit against a nonmember as a collateral attack on federal administrative orders the tribe no longer likes. As a matter of federal law, those orders, issued by the Bureau of Indian Affairs (BIA) and the National Indian Gaming Commission (NIGC), establish that the tribal council led by Alex Walker, Jr., (the Walker Council) was the only tribal council in 2003 with authority to operate the federally regulated casino of the Sac and Fox Tribe of the Mississippi in Iowa. The Tribe did not appeal those orders except for one, which was upheld. Yet years later, the Tribe claims that (a) its tribal court can hold that another, *unrecognized* tribal council was actually the only council with authority over the casino; (b) its tribal court can adjudicate tort claims that would impose severe liability on a nonmember (Attorney's Process and Investigation Services, Inc., (API)) who, in accordance with the federal orders, contracted with the Walker Council to help it operate the casino; and (c) federal courts are powerless to vindicate the federal orders.

The supremacy of federal law requires that the Tribe's claims be rejected and that its tribal-court suit not be allowed to proceed. Federal law protects nonmembers from being subjected to tribal law in tribal courts. This Court has never allowed such a suit to proceed, yet has held that one might proceed if a tribe has regulatory jurisdiction over a nonmember, which exists in only two narrow circumstances (called the *Montana* exceptions after the decision that elaborated them). See *Plains Commerce Bk.* v. *Long*, 128 S. Ct. 2709, 2720 (2008); *Montana* v.

United States, 450 U.S. 544 (1981). Here, the Eighth Circuit Court of Appeals found that the Tribe's claims satisfied the rare second *Montana* exception, which permits a tribe to regulate conduct that "imperils the subsistence or welfare of the tribe," *i.e.*, conduct "catastrophic" for "the political integrity, the economic security, or the health or welfare of the tribe." *Plains Commerce*, 128 S. Ct. at 2726–2727.

In allowing the Tribe's suit to proceed, the Eighth Circuit answered two important questions of federal law in conflict with decisions of this Court and other courts, departed from elementary principles of administrative law and Indian jurisdiction, and, as a result, expanded tribal jurisdiction over nonmembers in a way that threatens federal Indian programs. *First*, the BIA and NIGC orders establish as a matter of federal law that, in 2003, the Walker Council alone had authority to control the casino and bind the Tribe to the contract with API. The Eighth Circuit erred in allowing the Tribe and tribal court to vitiate the contract and collaterally attack the federal orders by retroactively assigning a dissident council sole authority over the casino. *Second*, the federal orders conclusively establish that API did not threaten the Tribe with political and economic catastrophe in attempting to help the Walker Council fulfill the orders. API's alleged conduct was no more politically catastrophic than the orders recognizing the Walker Council (instead of the dissidents) and no more economically catastrophic than the orders closing the casino (until the Walker Council regained control from the dissidents). The Eighth Circuit erred in holding that the tribal court nonetheless may exercise jurisdiction over API under the second *Montana* exception.

This Court's review is warranted to right those serious errors, contain their adverse impact, and resolve the conflicts created by the Eighth Circuit's decision.

OPINIONS BELOW

The Eighth Circuit's opinion (App., *infra*, 1a–34a) is reported at 609 F.3d 927. The opinion of the United States District Court for the Northern District of Iowa (App., *infra*, 35a–62a) is unreported. An earlier opinion of the District Court is reported at 401 F. Supp. 2d 952. The opinion of tribal court of appeals (App., *infra*, 63a–98a) is unreported. The orders of the BIA (*id.* at 142a–148a) and the NIGC (*id.* at 99a–141a) are unreported.

JURISDICTION

The Eighth Circuit issued its decision on July 7, 2010. App., *infra*, 1a. On September 24, 2010, Justice Alito extended the time to file a petition for a writ of certiorari until November 4, 2010. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

25 U.S.C. § 2 provides that the Commissioner of Indian Affairs:

> shall * * * have the management of all Indian affairs and of all matters arising out of Indian relations.

25 U.S.C. § 2706(b) provides that the National Indian Gaming Commission:

> (1) shall monitor class II gaming conducted on Indian lands * * *; (2) shall inspect and examine all premises located on Indian

lands on which class II gaming is conducted; * * * (4) may demand access to and inspect * * * all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter; * * * [and] (7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes.

25 U.S.C. § 2713 provides in pertinent part:

(b)(1) The Chairman [of the Commission] shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, of regulations prescribed by the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(b)(2) * * * [T]he Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. * * *

(c) A decision of the Commission * * * to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of title 5.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

1. The Sac and Fox Tribe of the Mississippi in Iowa is a federally recognized Indian tribe that operates the Meskwaki Bingo Casino Hotel on the Tribe's trust lands in Tama, Iowa. App., *infra*, 2a.

According to its tribal constitution, approved by the Secretary of the Interior in 1937, the Tribe is to be governed by an elected council. In 2002 and 2003, the tribal constitution vested broad authority, including dispute-resolution power, in the elected council and did not establish a tribal court. *In re: Meskwaki Casino Litig.*, 340 F.3d 749, 751 (CA8 2003).

In 2002, the duly elected and federally recognized tribal council was chaired by Alex Walker, Jr. (the Walker Council). In the autumn of 2002, a dissident faction of the Tribe submitted recall petitions to the Walker Council. Exercising its dispute-resolution power, the Walker Council refused to call a special election, as the tribal constitution otherwise provided, because of defects in the petitions. *Ibid.*

On March 2, 2003, the dissidents pursued a self-help remedy not provided by the tribal constitution: the Tribe's hereditary chief appointed Homer Bear, Jr., and other dissidents to a new tribal council (the Bear Council). The Bear Council claimed authority, above and beyond that of the Walker Council, to govern the Tribe under traditional tribal powers that predate the tribal constitution.[1] The Bear Council

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[1] In April 2003, the Tribe sued the Bear Council in federal court, seeking a declaration of which council was authorized to

(footnote continued on next page)

unilaterally hosted and won a special election on May 22, 2003. *Ibid.*

By letter dated March 13, 2003, the Bear Council asked the BIA to recognize it as the Tribe's governing council. The Midwest Regional Director refused. On April 1, the Acting Assistant Secretary—Indian Affairs affirmed that the federal government continued to recognize the Walker Council, not the Bear Council, as head of the Tribe. The Walker Council's federal recognition was reaffirmed by the Deputy Commissioner of Indian Affairs and the Assistant Secretary—Indian Affairs in May and by the BIA in August. See App., *infra*, 142a–148a; see also *id.* at 70a, 113a–114a. The BIA stopped recognizing the Walker Council only after the Bear Council won a special election in November 2003. *Sac & Fox Tribe of the Miss. in Iowa, Election Bd.* v. *BIA*, 439 F.3d 832, 834 (CA8 2006).

2. In the middle of its effort to supplant the Walker Council, the Bear Council physically took control of the Tribe's casino away from the Walker Council on March 26, 2003. *In re: Meskwaki Casino Litig.*, 340 F.3d at 751–752. The Bear Council appointed a new Casino General Manager and Tribal Gaming Commission Chairperson. App., *infra*, 113a.

A month later, the NIGC issued a Notice of Violation, finding that the casino was being operated in violation of the Indian Gaming Regulatory Act (IGRA) and NIGC and tribal regulations. *Id.* at 99a–103a. According to the Notice of Violation, the Bear

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govern the Tribe. The suit was dismissed. See *Sac & Fox Tribe of the Miss. in Iowa* v. *Bear*, 258 F. Supp. 2d 938 (N.D. Iowa 2003), *aff'd*, 340 F.3d 749 (CA8 2003).

Council's occupation and control of the casino violated federal and tribal gaming laws because it (a) deprived the federally recognized tribal government (*i.e.*, the Walker Council) of sole proprietary interest in, and responsibility for, the casino; (b) denied authorized tribal officials access to the casino; and (c) presented a threat to public safety. *Ibid.* After the Notice of Violation, the NIGC issued a Temporary Closure Order, *id.* at 104a -109a, with which the Bear Council refused to comply. U.S. Marshals physically closed the casino on May 23, 2003. *Id.* at 115a. Although gaming at the casino then ceased, the Bear Council and other dissidents continued to occupy the premises. *Id.* at 4a–5a.

The Tribe did not contest the NIGC's findings of violations but appealed only the remedial portion of the closure order. (Despite having the option, the Bear Council did not formally participate in the appeal, but instead engaged in improper *ex parte* communications with the Presiding Official. *Id.* at 120a–123a.) In a Permanent Closure Order issued on September 10, 2003, the NIGC affirmed, holding that "closure * * * is the only practical remedy when an unrecognized faction has illegally taken over the tribal government and its gaming operation." The NIGC further declared that "[g]aming may resume * * * if the Commission is convinced, following a visit by a designated NIGC employee(s), that the Tribe, acting through a duly elected, federally recognized Tribal Council, is in control of the Tribe and Casino, and that no violations of the IGRA, NIGC or the Tribe's Gaming Ordinance exist." *Id.* at 140a–141a.

3. API is a Wisconsin corporation that provides investigative and security services to casino operators and Indian tribes, among others.

On June 16, 2003, about three weeks after the U.S. Marshals closed the casino, Alex Walker, Jr., acting on behalf of the Walker Council and the Tribe, retained API to perform investigative services related to the effort to reopen the casino in accordance with the NIGC orders. The June 2003 Agreement between API and the Tribe committed API to investigate the "individuals involved in the unlawful acts against the Tribal Government"; to develop "a security plan for the re-opening of the Tribe's Gaming Facility"; and to investigate "allegations of unlawful acts and tribal policy violations of the dissident group involving Tribal funds and gaming operations." *Id.* at 160a. The parties also agreed that all disputes "that may arise out of this Agreement" shall be arbitrated and that any arbitral award could be entered by either the District Court for the Northern District of Iowa under the Federal Arbitration Act or the Iowa state courts under Iowa law. *Id.* at 165a–166a.

The Tribe alleges that, from June through September 2003, the Walker Council paid API about $1 million for services rendered under the June 2003 Agreement. The Tribe further alleges that, on October 1, 2003, about three weeks after the NIGC issued the Permanent Closure Order declaring that the casino could reopen only after the federally recognized tribal council had control, API and its agents (some armed with batons and one armed with a firearm) entered the casino, which was still occupied by the Bear Council and other dissidents. Inside, API allegedly assaulted occupants, took and reviewed tribal property (specifically, gaming and business information), and caused about $7,000 worth of property damage. *Id.* at 150a–154a. The Tribe's allegations about API's conduct are still merely allega-

tions: no factfinder has considered their truth yet, and API expects to disprove them.

In December 2003, after the Bear Council won the November 2003 special election and obtained federal recognition, the NIGC reopened the casino. *Id.* at 5a.

II. THE PROCEEDINGS BELOW

1. In 2004, the Tribe established a tribal court comprising a trial court and a court of appeals. *Id.* at 6a. In August 2005, the Tribe filed a civil suit against API in the tribal court, claiming that API had committed torts under tribal law and owed compensatory and punitive damages. The Tribe's tort claims all presume that the Bear Council, not the Walker Council, had lawful operational control of the casino after May 2003. In particular, the Tribe's complaint claims that, on October 1, 2003, API (a) committed trespass by entering the casino and (b) committed trespass to chattels and misappropriated trade secrets by taking and reviewing casino business information. The Tribe's complaint also claims that, before October 1, 2003, API (c) converted tribal funds by accepting payment from the Walker Council. *Id.* at 155a–156a. The Tribe's complaint does not allege that API attempted to overthrow the Bear Council or otherwise interfere with tribal politics. By the complaint's admission, the Tribe brought its suit "to cause Defendant to return funds to the Tribe which Defendant unlawfully has taken and retained, and because Defendant committed torts against the Tribe and harm to tribal real property and to other tribal property on the Settlement." *Id.* at 149a.

In September 2005, API filed a motion to dismiss, arguing that the tribal court has no jurisdiction over API because it is not a member of the Tribe. API also requested that the Tribe submit to arbitration under the June 2003 Agreement. *Attorney's Process & Investigation Servs., Inc.* v. *Sac & Fox Tribe of the Miss. in Iowa*, 401 F. Supp. 2d 952, 955 (N.D. Iowa 2005) ("*API I*").

2. In October 2005, API filed a complaint against the Tribe in the District Court for the Northern District of Iowa. API's complaint claims that the Tribe breached the June 2003 Agreement by refusing arbitration, and API sought an order compelling arbitration under the Federal Arbitration Act. In addition, under cases holding that a non-Indian can challenge a tribe's assertion of jurisdiction over him, see *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985), API sought a declaratory judgment that the Tribe and the tribal court have no jurisdiction over API. App., *infra*, 37a–38a, 43a.

In November 2005, the District Court stayed its proceedings while API and the Tribe litigated jurisdictional questions in tribal court. *API I*, 401 F. Supp. 2d at 963.

3. Two-and-a-half years later, the tribal trial court ruled that it had jurisdiction over API. App., *infra*, 64a.

The tribal court of appeals affirmed. Applying tribal law, it held that the Bear Council had replaced the Walker Council as the duly elected tribal council when it won the May 2003 special election it held. *Id.* at 81a–87a. For that reason alone, the court concluded that the Walker Council lacked authority to bind the Tribe to the June 2003 Agreement. *Ibid.*

The court held that the 2003 BIA determinations and the NIGC orders had no bearing on its resolution of the question whether the Walker Council had authority to operate casino and to commit the Tribe to the June 2003 Agreement. *Id.* at 77a–81a.

The tribal court of appeals identified two bases for applying tribal law to API in tribal court. First, the court held that it had "*presumptive* civil jurisdiction" over API because API allegedly committed torts on tribal trust land. *Id.* at 94a (emphasis in original). Assuming, in the alternative, that it presumptively lacks jurisdiction over nonmembers no matter where their conduct occurs, the court held that the Tribe's case fit within only one of the two *Montana* exceptions to the prohibition. The court specifically held that the first exception, which allows tribal law to be applied to certain consensual relationships between a nonmember and a tribe or its members, was not satisfied because the Tribe's tort claims all "are premised on *lack* of consent and turn on the Tribe's claim that there was no valid Contract." *Id.* at 91a (emphasis in original). The court then held, however, that this was "the rare case" that satisfied the second *Montana* exception, which allows tribal law to be applied to nonmember conduct that imperils a tribe, because API's alleged conduct "was a direct threat to every aspect of tribal integrity and to the right of the Tribe to 'make its own laws and be governed by them.'" *Id.* at 94a (quoting *Nevada* v. *Hicks*, 533 U.S. 353, 361 (2001)).

4. After the tribal court's decision on jurisdiction, the District Court lifted its stay, considered the parties' dispositive motions, and agreed with the tribal court that the second *Montana* exception gives the

Tribe and the tribal court jurisdiction over API. *Id.* at 52a–59a.

5. The Eighth Circuit Court of Appeals affirmed in part and vacated in part. At the outset, the Court accepted the tribal court's conclusion that, as a matter of tribal law, the Bear Council acceded to power upon winning the May 2003 special election. *Id.* at 4a.

The Eighth Circuit recognized that, when applying the *Montana* exceptions, a court must examine the specific conduct regulated by each claim in a tribal-court complaint. *Id.* at 15a. Yet that examination, the Court held, "should not simply consider the abstract elements of the tribal claim at issue, but must focus on the specific nonmember conduct alleged, taking a functional view of the regulatory effect of the claim on the nonmember." *Id.* at 17a. In light of the broader factual allegations in the Tribe's complaint, not just the alleged conduct specifically at issue in the Tribe's tort claims, *id.* at 18a–19a, the Court concluded that API's alleged conduct on October 1, 2003, (a) threatened the Tribe's health and welfare because it was "reasonably likely to result in violence on tribal lands," *id.* at 20a; (b) threatened the Tribe's political integrity and economic security because it attempted "to seize control of the tribal government and economy by force," *ibid.*; and (c) occurred on tribal land, where the Tribe has greater power, *id.* at 21a. In a footnote, the Court specifically attributed "[n]o jurisdictional significance" to the BIA and NIGC orders. *Id.* at 21a n.7.

The Eighth Circuit therefore affirmed the District Court's holding that the tribal court has jurisdiction over the Tribe's trespass and trade-secrets claims under the second *Montana* exception. *Id.* at 22a.

And the Eighth Circuit vacated the District Court's holding that the October 1, 2003, events also supported jurisdiction over the Tribe's conversion claim; that claim, the Court found, relates to conduct—the taking of funds—that preceded the alleged events of October 2003. *Id.* at 22a–25a. Although the tribal court specifically refused to exercise jurisdiction over the Tribe's conversion claim under the first *Montana* exception, the Eighth Circuit remanded for the District Court to decide whether that exception nevertheless applies. *Ibid.*

The Eighth Circuit also rejected API's argument that the June 2003 Agreement binds the Tribe to arbitrate its claims, even if the Bear Council became the duly elected tribal council under tribal law in May 2003, because the federal orders gave the Walker Council authority to operate and reopen the casino. The Court held that the NIGC's determination that the Walker Council (*not* the Bear Council) was the only entity that could legally operate the casino under federal and tribal law did not preclude the tribal court from reaching the opposite conclusion. According to the Eighth Circuit, the question of the Walker Council's authority is a "pure" question of tribal law that is "beyond the purview of the federal agencies and the federal courts." *Id.* at 29a. The Court further reasoned that the NIGC orders did not give the Walker Council authority to operate the casino and investigate the Bear Council's illegal operation of it because API allegedly used excessive force in October 2003 and because the NIGC relied upon the BIA to determine which council was federally recognized. *Id.* at 30a–31a.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S DISREGARD OF THE BIA AND NIGC ORDERS CONFLICTS WITH ESTABLISHED PRECEDENT AND UNDERMINES THE FEDERAL REGULATORY REGIME.

At the heart of this case is the question of who gets to decide whether, in June 2003, the Walker Council had authority to operate the Tribe's federally regulated casino, cure the violations the NIGC found, and contract with third-parties to accomplish those goals. Even though, at that time, the BIA had recognized the Walker Council and the NIGC had closed the casino subject to the Walker Council regaining control of it, the Eighth Circuit held that the federal agencies' orders could not have decided the Walker Council's authority because that authority is purely a matter of tribal law that only tribal courts can decide.[2] Thus, the Eighth Circuit held that the

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[2] A federal court reviews *de novo* a tribal court's resolution of federal questions that bear on the tribal court's jurisdiction over a nonmember. See App., *infra*, 10a–14a; *AT&T Corp.* v. *Couer d'Alene Tribe*, 295 F.3d 899, 904 (CA9 2002); see also *Iowa Mutual Co.* v. *LaPlante*, 480 U.S. 9, 19 (1987) ("*Unless a federal court determines that the Tribal Court lacked jurisdiction*, however, proper deference to the tribal court system precludes relitigation of issues raised by the LaPlantes' bad-faith claim and resolved in the Tribal Courts.") (emphasis added). The Eighth Circuit questioned whether the authority of the Walker Council bears on the tribal court's adjudicative jurisdiction, which is why the Eighth Circuit suggested it should defer to the tribal court's disposition of the issue (though it conducted a *de novo* review anyway). App., *infra*, 10a–14a. The validity of the Agreement is principally a matter of tribal court's adjudicative jurisdiction: if valid, the tribal court must send the Tribe's claims to arbitration, *i.e.*, it must not adjudicate them.

(footnote continued on next page)

tribal court was free in 2008 to hold that the agencies erred five years earlier when they failed to recognize the Bear Council and closed the Tribe's casino because the Bear Council was operating it. On this important question of federal law, the Eighth Circuit's decision conflicts with decisions of this Court and other courts of appeals, deviates from basic principles of administrative law, and undermines federal Indian programs throughout the country.

A. Federal agencies' determinations of tribal control can be challenged and overturned only in authorized appeals.

Not all questions of tribal law are completely "beyond the purview of the federal agencies." App., *infra*, 29a. In certain circumstances, the BIA and NIGC must decide questions of tribal governance and questions of control of federally regulated casinos. The BIA "occasionally is forced to identify which of two or more competing tribal political groups to recognize as the proper representative of the tribe." *Cohen's Handbook of Federal Indian Law* § 4.06[1][b], p. 290 (2005) (hereinafter "Cohen"). The Secretary of the Interior, acting through the BIA, has power to manage "*all* Indian affairs and *all* matters arising out of Indian relations," 25 U.S.C. § 2 (emphases added), and thus has power to decide whether a putative tribal council is, or is not, acting on behalf of a tribe. See *Calif. Valley Miwok Tribe* v. *United States*, 515 F.3d 1262, 1267–1268 (CADC 2008) (affirming the Secretary's decision to reject a

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Accordingly, federal questions relevant to the Walker Council's authority—such as the significance of the BIA and NIGC orders—are answered *de novo*.

constitution submitted by one tribal faction on the ground that it did not "reflect majoritarian values"); see also *Seminole Nation* v. *United States*, 316 U.S. 286, 296–297 (1942) (for the federal government knowingly to deal with "a tribal council which * * * was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation"). For its part, the NIGC has power to issue casino closure orders for violations of federal and tribal laws, which, include laws relating to operation of a casino by recognized entities. See 25 U.S.C. § 2713(b)(1). The Eighth Circuit thus had no basis for holding that "[t]here is no indication that Congress has granted the BIA or NIGC the authority API claims for them." App., *infra*, 33a.[3]

Both the BIA and NIGC exercised their authority in 2003. Attempting to identify the most representative tribal government, the BIA recognized the Walker Council over the Bear Council, concluding (wrongly, as the tribal court now says) that the May 2003 special election "was not called and held in ac-

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[3] Contrary to the Eighth Circuit's assertion, App., *infra*, 29a, API did not concede that the BIA and NIGC cannot interpret tribal law as necessary. See API's CA8 Opening Br. 31–36 (discussing agencies' power to identify a tribe's representative council); API's CA8 Reply Br. 13–14 ("Rightly or wrongly, all arms of the federal government recognized the Walker Council in June 2003, when API entered into the June 2003 Agreement. The time for challenging Walker's federal recognition has long since lapsed. The question remains whether, in June 2003, that federal recognition vested Walker with a limited federal authority to bind the Tribe in matters related to its federal affairs and federally regulated activities, including overseeing casino operations.").

cordance with tribal law." App., *infra*, 147a. And the NIGC closed the Tribe's casino until the unrecognized Bear Council gave up control of it and thereby rectified the substantial violations of federal and tribal law. *Id.* at 99a–103a.

That the agencies might have erred in their interpretation of the tribal laws at the root of their orders does not mean that the tribal court now can sit in review of those orders. Congress can require that challenges to federal administrative rulings be brought in particular forums at particular times. See *Yakus* v. *United States*, 321 U.S. 414, 434 (1944); *Lichter* v. *United States*, 334 U.S. 742, 792 (1948). Federal law specifically channels challenges to BIA decisions and NIGC orders. BIA decisions are reviewable by federal courts under the APA, 5 U.S.C. § 704, only after administrative appeals are exhausted, 25 CFR Part 2, 43 CFR Part 4. See *Stock West Corp.* v. *Lujan*, 982 F.2d 1389, 1391 (CA9 1993) ("Decisions made by BIA Area Directors are subject to administrative appeal."). NIGC closure orders are reviewable by federal courts, 25 U.S.C. § 2713(c), only after administrative appeals to the full Commission, *id.* §§ 2706(a)(5), 2713(b)(2). Tribal courts have no role in those processes, so they have no power to review or contradict the agencies' determinations, even when partially premised on tribal law. Cf. 25 U.S.C. § 2713(d) ("Nothing in this chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction *if such regulation is not inconsistent with this chapter or with any rules or regulations adopted by the Commission*.") (emphasis added).

To hold that BIA and NIGC orders bind tribal courts unless properly reversed is not to disparage the federal policy favoring Indian autonomy and self-government. After recognizing a council during an intratribal leadership dispute, the BIA must recognize a new council (if it is truly representative) when the dispute ends. See *Goodface* v. *Grassrope*, 708 F.2d 335, 339 (CA8 1983); *Wheeler* v. *BIA*, 811 F.2d 549, 552–553 (CA10 1987). While the BIA and NIGC orders did not strip the Tribe of power to resolve its leadership dispute under tribal law and elect a new council to lead it *prospectively*, the Tribe had (and still has) no independent power to undo the federal orders *retroactively*.[4]

Here, neither the Tribe nor any faction appealed the BIA's recognition of the Walker Council. And when the Tribe administratively appealed the NIGC's temporary closure order, it specifically did not dispute the finding that only the Walker Council could operate the casino consistent with federal and tribal law. Both agencies changed their positions only after the Bear Council won the November 2003 special election. Accordingly, by virtue of the 2003 federal orders—particularly the express terms of the NIGC orders—the Walker Council was the only entity with authority to operate the Tribe's casino lawfully while the orders were in effect (between May and November 2003), even if the Bear Council was actually duly elected in May 2003.

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[4] The same logic defeats the Eighth Circuit's holding that API's alleged use of excessive force in October 2003, retroactively negated the Walker Council's authority to operate the casino and enter the June 2003 Agreement four months earlier.

B. The Eighth Circuit's decision has broad negative consequences.

Because the Eighth Circuit has jurisdiction over a large percentage of the nation's Indian tribes and tribal courts, its holding that tribal law defines the authority of a federally recognized tribal council to bind a tribe to contracts within the council's federal sphere has a broad, harmful impact.[5] Under the holding, a tribe can repudiate any contract on the supposedly tribal-law ground that the negotiating council—despite its unchallenged federal recognition and despite federal orders affirming its exclusive authority in an area—was not actually duly elected under tribal law. Because the question is which law controls a federally recognized tribal council's authority within its federal sphere, there is nothing in the Eighth Circuit's reasoning that limits its holding to times when dissidents are openly challenging the federally recognized tribal council (as happened within the Tribe in 2003). If tribal law controls, a tribe could repudiate any contract at any time.

Federal recognition of tribal councils is the foundation for the federal government's provision of services to Indian tribes. As through the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.*, tribes now administer many programs the government used to administer for them. Third-party nonmembers are an important part of the regime. See, *e.g.*, *Ramah Navajo Sch. Bd.* v. *Bureau of Rev. of NM*, 458 U.S. 832, 834–835,

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[5] The vast majority of Indian law cases arise in the Eighth, Ninth, and Tenth Circuits. See Fletcher, *Factbound and Splitless*, 51 Ariz. L. Rev. 933, 956 (2009) (examining certiorari petitions filed between 1986 and 1993).

839–843 (1982) (describing cooperative federal/tribal school-building program in which non-Indians contracted with a tribe through its federally recognized tribal organization). Without federal recognition, nonmembers will balk at participating in federal Indian programs and federally authorized Indian enterprises. The provision of services to Indians will be paralyzed, and the success of Indian-controlled enterprises will be endangered, contrary to express congressional policy. See, *e.g.*, 25 U.S.C. § 450a (policies of Indian Self-Determination and Education Assistance Act); 25 U.S.C. § 2702 (policies of Indian Gaming Regulatory Act).

II. THE EIGHTH CIRCUIT APPLIED THE SECOND *MONTANA* EXCEPTION IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS.

The basic framework for determining whether an Indian tribe has civil legislative jurisdiction to regulate a nonmember is straightforward.[6] A tribe presumptively has no power to regulate nonmembers, no matter where their activities occur, and can do so only in two highly limited circumstances, called the *Montana* exceptions. See *Plains Commerce*, 128 S. Ct. at 2720. Under the first exception, a tribe may regulate certain consensual relationships between a nonmember and the tribe or its members. *Ibid.* Under the second exception—as originally conceived—a tribe may regulate nonmember conduct that "threatens or has some direct effect on the political integ-

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[6] Nonmembers are totally exempt from tribal criminal law and prosecution in tribal court. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

rity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

This Court has since noted that the original formulation of the second *Montana* exception "can be misperceived" to allow tribes so much jurisdiction that "the exception would severely shrink the rule." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 458 (1997). "Key to its proper application" is the preface to the description: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members * * *. But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." *Id.* at 459 (quoting *Montana*, 450 U.S. at 564) (internal quotation marks omitted) (alterations in original). See *Hicks*, 533 U.S. at 360–361 (quoting *Strate* and holding that "[t]ribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them."). Underscoring that narrowness, the Court has further held that the second *Montana* exception allows a tribe to regulate nonmembers only when their conduct threatens "the political integrity, the economic security, or the health or welfare of the tribe" with "*catastrophic consequences*." *Plains Commerce*, 128 S. Ct. at 2726–2727 (emphasis added).

In contrast with decisions involving tribal *legislative* jurisdiction, this Court's decisions have never upheld a tribal court's exercise of *adjudicative* jurisdiction over a nonmember. See *Hicks*, 533 U.S. at 374 (noting that the concurrence would have been the first). In fact, the Court has left open the ques-

tion of tribal-court jurisdiction over nonmember defendants in general. *Id.* at 358 & n.2; *id.* at 386 (Ginsburg, J., concurring). Rather than answer that question, the Court has held that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *Strate*, 520 U.S. at 453, and always has found the *Montana* exceptions not satisfied. See, most recently, *Plains Commerce*, 128 S. Ct. at 2726–2727. In other words, the Court has identified a potential necessary condition for tribal adjudicative jurisdiction over nonmembers, but never has identified what else may be necessary or what is sufficient.

A. In several ways, the Eighth Circuit's decision conflicts with this Court's decisions about tribal jurisdiction over nonmembers.

1. By focusing on the context of the Tribe's claims, rather than the conduct they challenge, the Eighth Circuit expanded the reach of the *Montana* exceptions.

This Court has held that the nonmember conduct a court must consider in applying the *Montana* exceptions is that which is "tied specifically" to the tribal law brought to bear on a nonmember. *Plains Commerce*, 128 S. Ct. at 2725 & n. 2. Tribal adjudicative jurisdiction over a nonmember defendant is permissible only when a tribe's claims "challenge" or "turn[] on" nonmember conduct that implicates the *Montana* exceptions. *Id.* at 2720; see *ibid.* (characterizing discrimination claims as challenging the sale of land).

In this case, the Tribe's trespass and trade-secrets claims challenge and turn on entry into a casino and taking and reviewing tribal gaming information—not conduct that inherently threatens a

tribe with catastrophe. Through its tort claims, the Tribe seeks relatively small real and personal property damages, which, as the Ninth Circuit has held, confirms that the claims do not implicate significant tribal interests. See *Boxx* v. *Long Warrior*, 265 F.3d 771, 777 (CA9 2001) (responding to the argument that a tribal court could adjudicate a claim because it involved drunk driving: "The action in tribal court does not seek to enforce or control the distribution or consumption of alcohol on the reservation. Rather, it seeks damages for negligence.").

Departing from this Court's instruction to focus on nonmember conduct, the Eighth Circuit held that "the allegations relevant to our jurisdiction inquiry are not limited to those that track the elements of the Tribe's claims. The *context* is also significant * * *." App., *infra*, 18a (emphasis added). The Eighth Circuit reached the wrong conclusion about the second *Montana* exception in this case because it incorrectly considered the "context" of the Tribe's case—including API's supposed involvement in tribal politics, which the Tribe's complaint does not allege—even though the Tribe's trespass and trade-secrets claims do not turn on those circumstances. *Id.* at 18a–22a. Neither the broader context of a case nor the conduct of tribe members is *nonmember conduct* that a tribal-law tort claim could challenge.

This Court's precedents point toward a categorical approach in applying the *Montana* exceptions, under which tribal law may be applied to nonmember conduct only if it categorically targets conduct that, by its nature or in the ordinary case, would fit within a *Montana* exception. *Cf. Taylor* v. *United States*, 495 U.S. 575 (1990); *James* v. *United States*, 550 U.S. 192, 201–202 (2007). The Eighth Circuit

expressly rejected that approach. App., *infra*, 16a–18a. Yet "[a]s to nonmembers, * * * a tribe's adjudicative jurisdiction does not exceed it legislative jurisdiction." *Strate*, 520 U.S. at 453. If tribal law (written or unwritten) does not generally challenge or turn on nonmember conduct that fits into the second *Montana* exception, a tribal court cannot adjudicate any claim against a nonmember premised on that law, or else the tribe's adjudicative jurisdiction would exceed its legislative jurisdiction. A categorical approach to the *Montana* exceptions provides clear notice to both a tribe and nonmembers about which tribal laws, if any, govern nonmember conduct. Given the "limited nature of tribal sovereignty and the liberty interests of non-members," clear notice is vital. *Plains Commerce*, 128 S. Ct. at 2723; see *Hicks*, 533 U.S. at 383 (Souter, J., concurring) ("The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals,' which differ from traditional American courts in a number of significant respects.") (quoting *Duro* v. *Reina*, 495 U.S. 676, 693 (1990)). And a categorical approach is highly suited to application before alleged facts are proved to a factfinder, for it prevents tribal-court plaintiffs from generating tribal-court jurisdiction through artful pleading, only to have the trumped-up allegations disproved at trial.

2. The Eighth Circuit improperly disregarded federal laws and administrative decisions in applying the second *Montana* exception.

Federal statutes and administrative decisions delimit a tribe's sovereignty for purposes of applying the *Montana* exceptions. "[T]he existence and extent

of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, *as well as a detailed study of relevant statutes*, Executive Branch policy as embodied in treaties and elsewhere, *and administrative or judicial decisions*." *Nat'l Farmers Union*, 471 U.S. at 855–856 (emphases added). In holding that API's alleged conduct on October 1, 2003, sustains the tribal court's jurisdiction over the Tribe's tort claims, the Eighth Circuit departed from that admonition. Without more, the Eighth Circuit held that the BIA and NIGC orders were irrelevant to applying the second *Montana* exception. App., *infra*, 21a n.7.

Had the Eighth Circuit properly considered the federal orders and the broader regulatory context, it would have seen that API's alleged investigatory activities—done in accordance with the NIGC orders closing the Tribe's casino, at the instance of the federally recognized tribal council those orders charged with operating the casino—could not have threatened the Tribe's sovereignty with catastrophe. "There is no doubt that IGRA constitutes a substantial infringement on the sovereign rights of tribes to be the exclusive regulators of gaming within their reservations." Cohen, § 12.02[4], p. 864. The IGRA substantially diminishes Indian sovereignty over casinos by making their operation subservient to federal power and by requiring that tribes open their land and records to authorized individuals. See 25 U.S.C. § 2706(b) (NIGC's investigative powers include power to access tribal lands and records and to hire help); *id.* § 2716 (allowing NIGC to share information with "appropriate law enforcement officials"); see also Cohen, § 12.02[5], p. 865 (the power to close tribal casinos "has been held to belong exclusively to

the federal government"); *Solis* v. *Matheson*, 563 F.3d 425 (CA9 2009) ("[O]ur previous decisions * * * implicitly ruled that * * * that federal officers were authorized to enforce the gambling prohibition by entering reservation property.").

The NIGC orders in this case specifically defeat the Eighth Circuit's holding that API's alleged conduct threatened the Tribe's political integrity and economic security. App., *infra*, 20a–21a. Because the orders affirm that the Walker Council alone could operate the casino, any effort to investigate the Bear Council's illegal operation of the casino and to help the Walker Council regain control could not have threatened the Tribe with political catastrophe.[7] See *Hicks*, 533 U.S. at 364–365 (the enforcement of state and federal law does not so impair

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[7] Although the Tribe's complaint does not allege a political overthrow, the Eighth Circuit nonetheless characterized the conduct actually alleged—entering the casino with 30 individuals, assaulting the dissidents inside, and taking and reviewing information *about the gaming operation*—as a "coup d'état." App., *infra*, 20a n.6. In *Strate* and *Plains Commerce*, this Court refuted the Eighth Circuit's notion that, for purposes of the second *Montana* exception, "[c]onduct reasonably likely to result in violence on tribal lands sufficiently threatens tribal health and welfare to justify tribal regulation." App., *infra*, 20a. See *Strate*, 520 U.S. at 457–458 ("Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if Montana's second exception requires no more, the exception would severely shrink the rule."); *Plains Commerce*, 128 S. Ct. at 2726 (requiring "catastrophic" injury to core tribal interests). The only case the Eighth Circuit cited to support its logic is inapposite, since it was *decided 14 years before* Strate. App., *infra*, 20a (citing *Babbitt Ford, Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587 (CA9 1983)).

tribal self-government that a tribal court may adjudicate claims of trespass and trespass to chattels). And because the NIGC orders had cut off the Tribe's revenue stream by closing the Tribe's casino until the Walker Council regained control, API's alleged entry into the casino and review of the casino's records could not have threatened the Tribe with economic catastrophe, either. All of the political and economic damage the Eighth Circuit ascribed to API's alleged conduct was damage the NIGC orders already did; by allegedly acting in accordance with those orders, API could not have done any more. Cf. *Plains Commerce*, 128 S. Ct. at 2723 (tribes cannot regulate sale of fee land because it "has already been alienated from the tribal trust").

3. The Eighth Circuit's reliance on land status is inconsistent with this Court's precedents.

After *Montana*, courts wrestled with whether the presumption against tribal jurisdiction over nonmembers was universal or whether it applied only to nonmember conduct on non-Indian fee land. Compare *McDonald* v. *Means*, 309 F.3d 530, 540 & n.9 (CA9 2002) (tribal ownership of land precludes application of *Montana*), with *id.* at 542 (Wallace, J., dissenting) ("The majority establishes a presumption in favor of tribal civil jurisdiction over nonmembers in cases involving tribal land."). The Court has since clarified that the presumption is universal. "[O]wnership status of land * * * is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" *Hicks*, 533 U.S. at 360; see *id.* at 388 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he majority is quite right that *Montana* should

govern our analysis of a tribe's civil jurisdiction over nonmembers both on and off tribal land.").

The Eighth Circuit held that the second *Montana* exception was satisfied because of the casino's location on tribal trust land—which is, after all, where the IGRA requires Indian casinos to be sited. See 25 U.S.C. § 2710 (regulating "gaming on Indian lands"). But it did not explain *why* that fact supported jurisdiction over any of the Tribe's claims—especially the trade-secrets claims, which have no connection with land. App., *infra*, 21a–22a. To *consider* ownership status of land requires more than merely *noting* who owns it. In *Strate*, for instance, the Court considered that the land in question was "open to the public" and that the tribe had "retained no gatekeeping right" over the land. 520 U.S. at 455–456. Here, as the IGRA and the NIGC orders make clear, on October 1, 2003, the Tribe had no gatekeeping rights vis-à-vis the NIGC, the federally recognized tribal council (*i.e.*, the Walker Council), and the council's authorized agents (*i.e.*, API). Moreover, when not temporarily closed by the NIGC, the Tribe's gaming enterprise is open to the public, a fact that the Oklahoma Supreme Court has concluded cuts against tribal jurisdiction over nonmembers at Indian casinos. See *Cossey* v. *Cherokee Nation Enters.*, 212 P.3d 447, 458 (Okla. 2009) ("Without the logic of *Plains*, which incorporates the general rule of *Montana* and its exceptions, Cossey and all other non-Indians would unknowingly subject themselves to tribal regulation and, thus, to tribal court jurisdiction without their consent merely by entering a casino in Indian Country.").

The Eighth Circuit's position that the second *Montana* exception was satisfied because "[t]he

Tribe's trespass and trade secret claims * * * seek to regulate API's entry and conduct upon tribal land," App., *infra*, 21a, effectively flips the presumption against tribal jurisdiction over nonmembers and revives the discarded notion that Indian tribes have plenary authority over nonmembers on Indian lands. At the very least, the Eighth Circuit's holding condones *per se* tribal jurisdiction over trespass claims, a result that, given the prevalence Indian casinos nationwide, would "swallow the rule" against tribal jurisdiction over nonmembers. *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 655 (2001).

4. The Eighth Circuit fully equated tribal legislative and adjudicative jurisdiction without any meaningful analysis.

In holding that the Tribe can regulate API under the second *Montana* exception, the Eighth Circuit equated tribal legislative and adjudicative jurisdiction over nonmembers and largely dodged the question, which *Hicks* expressly reserved, whether something more than legislative jurisdiction is needed before a tribal court has adjudicative jurisdiction over a nonmember. Citing *Strate*—which preceded *Hicks* and so could not have answered the question *Hicks* left open—the Eighth Circuit held that nothing more is needed and that a tribal court presumptively may exercise jurisdiction over a nonmember whenever a tribe possesses legislative jurisdiction over the nonmember conduct at issue in tribal-court claims. App., *infra*, 13a n.5. The Eighth Circuit's summary analysis is inconsistent with *Hicks*. "The question (which [this Court has] avoided) whether tribal regulatory and adjudicatory jurisdiction are coextensive" was "simply answered" by the Eighth Circuit "in the affirmative," but the question "surely deserves more

considered analysis." *Hicks*, 533 U.S. at 374. API should not be forced to defend itself in tribal court when neither this Court nor the Eighth Circuit has given the question of tribal-court jurisdiction over nonmembers the attention it deserves.

B. The Eighth Circuit's decision conflicts with other courts of appeals' decisions about tribal jurisdiction over nonmembers.

By downplaying the federal orders and federal law, the Eighth Circuit rejected other courts' conclusions about tribal sovereignty over federally regulated casinos.

The D.C. Circuit holds that "operation of a casino is not a traditional attribute of self-government." However important a casino may be to a tribe, the business operation "is virtually identical to scores of purely commercial casinos across the country." *San Manuel Indian Bingo & Casino* v. *NLRB*, 475 F.3d 1306, 1315 (CADC 2007). Contrary to the Eighth Circuit's position, nonmember conduct that injures (or threatens to injure) an Indian casino is not conduct that threatens a unique aspect of tribal integrity that the second *Montana* exception protects. Tribal regulation of such conduct is not, as it must be for a tribe to regulate it, "connected to that right of the Indians to make their own laws and be governed by them." *Hicks*, 533 U.S. at 360–361.

The Ninth Circuit holds that a tribe's decision to give up sovereignty in one area undercuts subsequent efforts to invoke the second *Montana* exception to regulate nonmember conduct in that area. Giving up the right to exclude, for instance, "is a significant alienation of tribal sovereignty and control." "Having ceded that right," a tribe cannot assert ju-

risdiction over a nonmember "for activities arising directly out of the arrangement" because such activities cannot "be seen as threatening self-government or the political integrity, economic security or health and welfare of the tribe." *County of Lewis* v. *Allen*, 163 F.3d 509, 514–515 (CA9 1998) (en banc) (tribe had consented to have state exercise concurrent criminal jurisdiction). Before it could operate a casino under the IGRA, the Tribe gave up its right to exclude authorized persons from the casino and its rights to keep its gaming information from authorized persons. See, *supra*, pp. 25–26. The Eighth Circuit nonetheless allowed the Tribe to claim infringement of its ceded rights.

Since *Strate* refined the second *Montana* exception to stop it from being "misperceived," federal courts of appeals confronting a wide variety of claims and fact patterns have largely rejected tribal-court jurisdiction under the exception.[8] The Eighth Cir-

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[8] See, *e.g.*, *Town Pump, Inc.* v. *LaPlante*, 2010 WL 3469578 (CA9 Sept. 3, 2010) (toxic discharges); *Philip Morris USA* v. *King Mountain Tobacco*, 569 F.3d 932 (CA9 2009) (trademark dispute); *Nord* v. *Kelly*, 520 F.3d 848 (CA8 2008) (car accident); *MacArthur* v. *San Juan County*, 497 F.3d 1057 (CA10 2007) (employment dispute); *Boxx* v. *Long Warrior*, 265 F.3d 771 (CA9 2001) (drunk driving); *Burlington N. R.R. Co.* v. *Red Wolf*, 196 F.3d 1059 (CA9 2000) (train collision); *County of Lewis* v. *Allen*, 163 F.3d 509 (CA9 1998) (en banc) (state-officer arrest); *Hornell Brewing Co.* v. *Rosebud Sioux Tribal Court*, 133 F.3d 1087 (CA8 1998) (defamation, right of publicity, and intentional infliction of emotion distress); *Wilson* v. *Marchington*, 127 F.3d 805 (CA9 1997) (car accident); *Yellowstone County* v. *Pease*, 96 F.3d 1169 (CA9 1996) (state property taxes).

Courts that have permitted tribal courts to adjudicate claims against nonmembers have not relied upon the second *Montana* exception. See, *e.g.*, *Smith* v. *Salish Kootenai College*,

(footnote continued on next page)

cuit's holding that the tribal court has jurisdiction over API under the second *Montana* exception is truly unprecedented and thus deserves this Court's review.[9]

C. The Eighth Circuit's errors are squarely presented.

This case is not interlocutory simply because the Eighth Circuit vacated the portion of the District Court judgment holding that the second *Montana* exception allows the tribal court to exercise jurisdiction over the Tribe's conversion claim. If API prevails on remand, it will be forced to litigate the trespass and trade-secrets claims in tribal court, and API will have no further opportunity to seek this Court's review. Moreover, the Eighth Circuit rejected API's arguments about the BIA and NIGC orders, which would have defeated tribal jurisdiction over *all* the Tribe's claims.

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434 F.3d 1127 (CA9 2006) (en banc) (affirming jurisdiction under first exception over nonmember who filed counterclaims in tribal court); *McDonald* v. *Means*, 309 F.3d 530 (CA9 2002) (affirming jurisdiction over a car accident without applying the *Montana* exceptions).

[9] As support, the Eighth Circuit cited *Elliott* v. *White Mountain Apache Tribal Court*, where, instead of deciding whether a tribe satisfied the *Montana* exceptions, the court held that the tribe had a "colorable" argument under the exceptions such that the nonmember had to litigate the jurisdictional questions in tribal court before seeking federal-court relief. See 566 F.3d 842, 848–850 (CA9 2009); see also *Hicks*, 533 U.S. at 369 (nonmembers must exhaust tribal-court remedies unless it is "plain" that tribal-court jurisdiction is lacking). *Elliott* thus does not anchor the Eighth Circuit's decision to subject API to trial in tribal court.

Additionally, the first *Montana* exception is not an alternative basis for sustaining the tribal court's jurisdiction, and the Eighth Circuit's notation that the Tribe's conversion claim might satisfy the first *Montana* exception disregards this Court's precedents. Though broadly defined as giving tribes regulatory power over nonmembers who "enter consensual relationships with the tribe or its members," *Montana*, 450 U.S. at 465, the first *Montana* exception, like the second, only permits tribal-court claims when they challenge or turn on those relationships. See *Plains Commerce*, 128 S. Ct. at 2720; see also *Atkinson*, 532 U.S. at 656 ("*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself."). The first exception focuses on contracts, not torts. See *Strate*, 520 U.S. at 457. The Tribe contends that it is a stranger to API's relationship with the Walker Council, which precludes applying the first *Montana* exception. See *ibid.* (a nonmember's contract with a tribe did not confer jurisdiction over tort claims because the injured plaintiff was not a party to the contract and the tribe was not involved in the accident). The tribal court correctly held that the Tribe's claims all "are premised on *lack* of consent and turn on the Tribe's claim that there was no valid Contract." App., *infra*, 91a (emphasis in original). Moreover, API has neither "expressly" nor by its "actions" consented to tribal-court jurisdiction. *Plains Commerce*, 128 S. Ct. at 2724. The June 2003 Agreement's arbitration and forum-selection clauses plainly manifest API's withholding of such consent. See *id.* at 2729 (Ginsburg, J., dissenting).

Finally, the Eighth Circuit's implicit holding that a federal court can affirm a tribal court's adjudica-

tive jurisdiction on a ground the tribal court explicitly rejected is without foundation. Only a nonmember defendant may challenge a tribal court's exercise of adjudicative jurisdiction because "federal courts have authority to determine * * * whether a tribal court has *exceeded* the limits of its jurisdiction." *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 483 (1999) (emphasis added) (citing *Nat'l Farmers Union*, 471 U.S. at 852–853). If a tribal court concludes that it lacks jurisdiction, it cannot have "exceeded the limits of its jurisdiction" and the tribal-court plaintiff has no cause of action to have a federal court force the unwilling tribal court to proceed. So too here. When a tribal court disclaims a ground for jurisdiction, federal courts cannot compel it to proceed on that ground. Thus, the Eighth Circuit's partial remand under the first *Montana* exception is yet another way in which its decision conflicts with precedent and expands tribal court jurisdiction over nonmembers.

CONCLUSION

The Eighth Circuit's decision departs from basic principles of administrative law, greatly expands tribal jurisdiction over nonmembers (contrary to this Court's teachings), and destabilizes federal Indian programs that rely on nonmember participation. The Court should grant API's petition for certiorari to correct the Eighth Circuit's fundamental errors.

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No. 10-

IN THE

Supreme Court of the United States

ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC.,

Petitioner,

v.

SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION APPENDIX

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United States Court of Appeals Eighth Circuit

ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC., Plaintiff-Appellant,

v.

SAC & FOX TRIBE OF the MISSISSIPPI IN IOWA, Defendant-Appellee.

No. 09-2605.

Submitted: April 13, 2010.

Filed: July 7, 2010.

Before WOLLMAN, MURPHY, and SHEPHERD, Circuit Judges.

MURPHY, Circuit Judge.

After Attorney's Process and Investigation Services, Inc. (API), a Wisconsin corporation which provides security and consulting services to casino operators, was sued in tribal court by the Sac and Fox Tribe of the Mississippi in Iowa (the Tribe), API brought this action seeking a declaratory judgment that the tribal court lacked jurisdiction and an order compelling arbitration. The Tribe's lawsuit in tribal court alleged that API committed torts while seizing control of tribal facilities on the Sac and Fox reservation under a contract signed by Alex Walker, Jr., the former Chairman of the Tribal Council.

The district court required API first to exhaust its remedies in tribal court in accord with *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S. Ct. 2447, 85 L.Ed.2d 818 (1985). After API returned to federal court, the district court concluded that the tribal courts did have jurisdiction over the Tribe's claims under federal law, that the validity of the API contract was a question of tribal

law, and that it should accordingly defer to the tribal court finding that Walker had not had authority to bind the Tribe. The district court therefore denied API's motion for summary judgment and granted the Tribe's motion to dismiss. API appeals.

In the course of considering the issues before us we first examine the factual background of the litigation before proceeding to address the initial federal law question of whether the tribal courts have jurisdiction over the Tribe's lawsuit against API. We then turn to API's claim that it is entitled to arbitration under its contract with Walker. Finally, we summarize our conclusions and judgment. We affirm in part and reverse in part.

I.

The Sac and Fox Tribe of the Mississippi in Iowa is a federally recognized Indian tribe which owns and operates the Meskwaki Bingo Casino Hotel. The casino operation is located in Tama, Iowa on the Tribe's trust lands, known as the Meskwaki Settlement. The Tribe's governing body is a seven member council. The tribal economy depends on the casino, which the Tribe has operated for approximately fifteen years, and which generates millions of dollars in annual revenue.[1]

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[1] According to the Meskwaki Casino's website, it is the largest full service casino in the Midwest. *See* www.meskwaki.com. At the time of the events which led to this litigation, the casino reportedly employed some 1,300 people and generated several million dollars in gross revenue per week. Mark Siebert, Casino May Reopen in 8 Weeks; The Long-Running Power Struggle on the Meskwaki Settlement Could Be Resolved by the End of November, Des Moines Register, Oct. 1, 2003, at 1B.

During the spring and summer of 2003, two groups were competing for control of the tribal government, the Tribe's finances, and the casino.[2] One group was led by Walker, who had been Chairman of the Tribal Council before the other group organized in opposition. Members of the Tribe who were dissatisfied with Walker's leadership challenged his legitimacy in September 2002 by submitting petitions demanding his recall and also that of the rest of his council. According to the tribal constitution a special election is to be called upon receipt of such petitions, but the Walker Council did not call an election. That left the petitioning tribal members without further legal recourse since there was not yet a tribal court.

The opposition to the Walker Council was led by the hereditary chief of the Tribe, Charles Old Bear. Invoking retained traditional power to form a new tribal government, Chief Old Bear appointed seven new council members. A majority of tribal members signed a declaration supporting Old Bear's actions, and at a general meeting of the tribal membership he administered oaths of office to the new council. Thereafter at another general meeting of the Tribe, a majority agreed that the members of the Walker faction were not "persons of honor, law abiding, and of good character" as the tribal constitution requires of office holders. The Bear Council and its supporters then proceeded to occupy the casino and the tribal

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[2] *See generally Sac & Fox Tribe of the Mississippi in Iowa, Election Bd. v. BIA*, 439 F.3d 832 (8th Cir. 2006); *In re: Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749 (8th Cir. 2003). Our description of the factual background draws on those decisions as well the record in this case.

government offices at the Tribe's community center. A special election was held on May 22, 2003, at which the Bear Council received a large majority of the votes.

The Walker Council refused to step down, however, and a standoff ensued. Since the Bureau of Indian Affairs (BIA) did not act immediately on the results of the May special election, its prior recognition of the Walker Council as the governing body remained in place and the casino was closed by the National Indian Gaming Commission (NIGC). The Walker group then turned to litigation in an attempt to oust the Bear Council from the casino and the tribal government, but the federal courts declined to intervene because federal "jurisdiction does not exist to resolve an intratribal leadership dispute." *Meskwaki Casino Litig.*, 340 F.3d at 766.

The month after the Bear Council won the tribal election on May 22, 2003, Walker brought API into the picture. Putatively acting as council chairman, he executed a contract with API in June 2003. Under their contract API agreed to "perform services directly relating to the investigation of a takeover by dissidents at the Tribe's facility located on the Tribe's reservation lands," including "[i]nvestigation of individuals involved in the unlawful acts against the Tribal Government." The agreement further indicated that API was to undertake various projects related to security, such as "[d]eveloping a security plan for the re-opening of the Tribe's Gaming Facility." The signatories agreed to arbitrate all disputes arising out of the contract.

API took the actions that eventually led to this litigation on October 1, 2003. Near dawn on that day, as the Bear Council and its supporters contin-

ued their occupation of the casino and tribal government offices, a group of approximately 30 API agents forced their way into the buildings. The two facilities are located on tribal trust land about 2.5 miles apart and are connected by a tribal road. Some of the API personnel were armed with batons, and at least one carried a firearm. They seized sensitive confidential information from both facilities related to the Tribe's gaming operations and finances. The record does not disclose what other services API may have performed under the June 2003 contract.

The Walker Council never regained control of the tribal government or the casino after API's forceful intervention. In special elections held in the fall of 2003 the Bear Council prevailed again, and in November it was recognized by the BIA as the duly elected tribal government. Based on the BIA's action, the NIGC lifted its closure order for the casino in December 2003, and the Tribe reopened the casino.

The Tribe brought its tort action against API in the tribal trial court in August 2005, alleging that in the course of its raid on tribal facilities API had caused some $7,000 in property damage, wrongfully seized confidential information related to the Tribe's gaming operations and finances, and committed intentional torts against tribal members, including assaults, batteries, and wrongful imprisonments.[3] Based on these allegations the Tribe's complaint made claims for trespass to tribal land and chattels and misappropriation of tribal trade secrets. It also

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[3] The Tribe's complaint did not seek relief for torts against any specific individual tribal members; it alleged generally that such torts had been committed.

made a claim for conversion of $1,022,171.26 in tribal funds paid to API under its contract with Walker. For these acts the Tribe sought compensatory and punitive damages. API moved to dismiss, arguing that the tribal courts lacked subject matter jurisdiction and that it had a valid contract requiring arbitration.

Shortly thereafter API filed this action in the federal district court seeking a declaration that the tribal court lacked subject matter jurisdiction and an order compelling arbitration under the contract signed by Walker. API moved for a preliminary injunction against further proceedings in the tribal court. The district court denied that motion and stayed the action pending API's exhaustion of remedies in the tribal courts. *See Nat'l Farmers Union*, 471 U.S. at 857, 105 S. Ct. 2447 (holding that federal court should not consider a challenge to tribal court jurisdiction until remedies are exhausted in tribal courts). The parties then directed their attention to proceedings in the tribal trial court.

The Tribal Court of the Sac and Fox Tribe was established by the Tribal Council in 2004. It consists of a trial court and a court of appeals. The court organization, rules of procedure, and related provisions are contained in Title 5 of the Tribal Code. The Tribal Court currently has one Chief Justice of the Court of Appeals and three trial court judges, one of whom serves as chief judge. None of the judges is a member of the Sac and Fox Tribe. All are enrolled members of other tribes.[4]

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[4] *See* Tribal Court of the Sac & Fox Tribe of the Mississippi in Iowa, at http://www.meskwakicourt.org/personnel.html.

After concluding that it had subject matter and personal jurisdiction, the tribal trial court denied API's motion to dismiss. It also determined that as a matter of tribal law Alex Walker, Jr. and his council had been removed from office before June 2003. Walker therefore had been without authority to bind the Tribe to the contract he entered into with API. *See Sac and Fox Tribe of the Mississippi in Iowa v. Attorney's Process and Investigation Servs., Inc.*, No. API-CV-DAMAGES-2005-01, at 10-12 (Sac and Fox Tribe of the Mississippi in Iowa Tribal Court Mar. 26, 2008). For that reason the arbitration agreement could not be enforced.

The tribal court of appeals affirmed, holding that "the Hereditary Chief's actions of April 14, 2003 at the General Council and the Special Election on May 22, 2003 were sufficient to effect a change in Tribal leadership" and that Walker's agreement with API was therefore invalid. *Sac and Fox Tribe of the Mississippi in Iowa v. Attorney's Process and Investigation Servs., Inc.*, No. API-CV-APP-2008-02-124, at 13 (Appellate Court of the Sac and Fox Tribe of the Mississippi in Iowa Dec. 23, 2008) (Tribal Court of Appeals Decision). It also concluded that the tribal courts had jurisdiction over the Tribe's tort claims under *Montana v. United States*, 450 U.S. 544, 566, 101 S. Ct. 1245, 67 L.Ed.2d 493 (1981), since a "tribe may ... retain inherent power to exercise civil authority over the conduct of non-Indians ... within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *See* Tribal Court of Appeals Decision at 16.

With its remedies in tribal court thus exhausted, API returned to the district court which reopened

the federal case. API moved for summary judgment, seeking a declaration that the tribal courts lacked subject matter jurisdiction and that it was entitled to arbitration under the contract signed by Walker. The Tribe moved to dismiss, arguing that API's suit was barred by its sovereign immunity and that its claims lacked merit in any event.

The district court denied API's motion for summary judgment and granted the Tribe's motion to dismiss. Concluding that "API's conduct had a 'direct effect' on both the political integrity and the economic security of the Tribe," the district court determined that the tribal courts had properly exercised jurisdiction under *Montana*. It also concluded that whether Walker had the authority to bind the Tribe at the time he entered into the June 2003 agreement with API was a matter of tribal law. Consequently it deferred to the tribal courts' determination that Walker had not possessed that authority so the contract did not bind the Tribe. Because the Tribe never agreed to arbitrate any disputes with API, it had not waived its sovereign immunity and the arbitration agreement could not be enforced.

API timely appealed to this court. On appeal it raises the same two arguments it made in the district court. First, API maintains that the tribal courts have no subject matter jurisdiction over the Tribe's claims and that the district court erred in its application of *Montana v. United States*. Second, API contends that federal law rather than tribal law governs the validity of the Walker contract so the district court should not have deferred to the tribal court determination that the contract was not binding on the Tribe. API asserts that the contract binds

the Tribe and that API is therefore entitled to an order compelling arbitration of the Tribe's claims.

We review de novo the district court's grant of a motion to dismiss. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009). The extent of tribal court subject matter jurisdiction over claims against nonmembers of the Tribe is a question of federal law which we review de novo. *Nord v. Kelly*, 520 F.3d 848, 852 (8th Cir. 2008). In deciding the jurisdictional issue we review findings of fact by the tribal courts for clear error and defer to their interpretation of tribal law. *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756-57 (8th Cir. 2004).

II.

Whether a tribal court has authority to adjudicate claims against a nonmember is a federal question within the jurisdiction of the federal courts. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, ---U.S. ----, ----, 128 S. Ct. 2709, 2716, 171 L.Ed.2d 457 (2008). Where, as here, tribal jurisdiction is not specifically authorized by federal statute or treaty, a tribe's adjudicatory authority must stem from its "retained or inherent sovereignty." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 649-50, 121 S. Ct. 1825, 149 L.Ed.2d 889 (2001). The limits of that retained power as it relates to tribal civil jurisdiction have been established primarily through judicial decisions. *See* Felix Cohen, Cohen's Handbook of Federal Indian Law § 7.01 (5th ed.2005) (hereinafter Cohen).

The scope of tribal civil authority over nonmembers remained "ill-defined" as recently as 2001. *Nevada v. Hicks*, 533 U.S. 353, 376, 121 S. Ct. 2304, 150 L.Ed.2d 398 (2001) (Souter, J., concurring). The

controlling principles are broad and abstract and must be carefully applied to the myriad disparate factual scenarios they govern. Determining the contours of tribal civil jurisdiction and the boundaries of tribal sovereignty requires consideration of the historical scope of tribal sovereignty and the evolving place of the tribes within the American constitutional order, careful study of precedent, and ultimately a "proper balancing" of the conflicting interests of the tribes and nonmembers. *Id.* at 374 (opinion of the Court).

A.

For much of our nation's history, the Indian tribes were regarded as "distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559, 8 L.Ed. 483 (1832). As such, they have been understood to "possess[ ] attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710, 42 L.Ed.2d 706 (1975). Precisely which attributes of sovereignty the tribes retain, however, has been developing over time.

In some of its earliest decisions the Supreme Court recognized that the tribes had been divested of the sovereign power to carry on relations with foreign states by the colonization of the American continent and the tribes' relationship with the federal government. *See Worcester*, 31 U.S. (6 Pet.) at 559; *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573-74, 5 L.Ed. 681 (1823). The tribes were long understood to exercise plenary power within their respective territories, however, subject only to the "supreme legislative authority of the United States." *Talton v.*

Mayes, 163 U.S. 376, 384, 16 S. Ct. 986, 41 L.Ed. 196 (1896); *see Worcester*, 31 U.S. at 557-61, 6 Pet. 515; *Williams v. Lee*, 358 U.S. 217, 223, 79 S. Ct. 269, 3 L.Ed.2d 251 (1959). Thus, "[a]t one time [Indian tribes] exercised virtually unlimited power over their own members as well as those who were permitted to join their communities." *Nat'l Farmers Union*, 471 U.S. at 851, 105 S. Ct. 2447.

Express policies of the political branches later diminished the broad scope of tribal sovereignty, *see Montana*, 450 U.S. at 563, 101 S. Ct. 1245, and judicial decisions have divested tribes of certain aspects of sovereign power which appeared inconsistent with their status as "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831). In other words the tribes' "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L.Ed.2d 303 (1978).

Among the most significant areas of "implicit divestiture of sovereignty ... are those involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* at 326, 98 S. Ct. 1079. As the Supreme Court has recently observed, the "'sovereignty that the Indian tribes retain is of a unique and limited character.' It centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank*, 128 S. Ct. at 2718 (quoting Wheeler, 435 U.S. at 323, 98 S. Ct. 1079). Although there are exceptions, tribes generally no longer "possess authority over non-Indians who come within their borders." *Id.*

The federal principles which govern tribal civil jurisdiction over nonmembers were set out in *Montana v. United States*, and that decision remains the "'pathmarking case' on the subject." *Hicks*, 533 U.S. at 358, 121 S. Ct. 2304 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 445, 117 S. Ct. 1404, 137 L.Ed.2d 661 (1997)). In *Montana*, the Supreme Court concluded that the Crow Tribe lacked the power to prohibit hunting and fishing by nonmembers on non Indian fee land within the reservation because "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes." 450 U.S. at 564, 101 S. Ct. 1245. As a general matter, the Court held, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565, 101 S. Ct. 1245. Accordingly, "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" *Plains Commerce Bank*, 128 S. Ct. at 2720 (quoting Atkinson, 532 U.S. at 659, 121 S. Ct. 1825).

As the Supreme Court has explained, however, "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montana*, 450 U.S. at 565, 101 S. Ct. 1245. The Court has recognized two categories of nonmember conduct which may be regulated by tribes, commonly termed the "*Montana* exceptions." First, a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Second, a "tribe may also retain inherent power to exercise civil authority over

the conduct of non-Indians ... within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

The *Montana* exceptions are rooted in the tribes' inherent power to protect certain sovereign interests. *See Plains Commerce Bank*, 128 S. Ct. at 2723. Paramount among those interests is the right of Indian tribes to "make their own laws and be governed by them," *Hicks*, 533 U.S. at 361, 121 S. Ct. 2304, and in accordance with that right tribes "may regulate nonmember behavior that implicates tribal governance and internal relations." *Plains Commerce Bank*, 128 S. Ct. at 2723. Ultimately then, "'[t]ribal self-government' is at the heart of tribal jurisdiction." *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1133 (9th Cir. 2006) (en banc) (quoting *Montana*, 450 U.S. at 564, 101 S. Ct. 1245), cert. denied, 547 U.S. 1209, 126 S. Ct. 2893, 165 L.Ed.2d 922 (2006).

Although the issue in the *Montana* case was about tribal regulatory authority over nonmember fee land within the reservation, *Montana*, 450 U.S. at 547, 101 S. Ct. 1245, *Montana*'s analytic framework now sets the outer limits of tribal civil jurisdiction-both regulatory and adjudicatory-over nonmember activities on tribal and nonmember land. The Supreme Court held in *Strate v. A-1 Contractors* that "[a]s to nonmembers ... a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate*, 520 U.S. at 453, 117 S. Ct. 1404.[5] Tribal court

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[5] Although in *Hicks* the Supreme Court reserved the question "whether a tribe's adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction," 533 U.S. at 358, 121 S. Ct. 2304 (emphasis in original), it has indicated

(footnote continued on next page)

jurisdiction thus "turns upon whether the actions at issue in the litigation are regulable by the tribe." *Hicks*, 533 U.S. at 367 n. 8, 121 S. Ct. 2304. The Court has also indicated that "*Montana* applies to both Indian and non-Indian land." *Id.* at 360, 121 S. Ct. 2304; *see also id.* at 387, 121 S. Ct. 2304 (O'Connor, J., concurring in part) ("Today, the Court finally resolves that *Montana v. United States* governs a tribe's civil jurisdiction over nonmembers regardless of land ownership.") (citation omitted); *MacArthur v. San Juan County*, 497 F.3d 1057, 1069-70 (10th Cir. 2007).

Because "efforts by a tribe to regulate nonmembers ... are presumptively invalid," the Tribe bears the burden of showing that its assertion of jurisdiction falls within one of the *Montana* exceptions. *Plains Commerce Bank*, 128 S. Ct. at 2720 (quotation marks omitted). Those exceptions are narrow ones and "cannot be construed in a manner that would 'swallow the rule.'" *Id.* (quoting Atkinson Trading Co., 532 U.S. at 655, 121 S. Ct. 1825).

B.

The district court determined that the tribal courts could exercise jurisdiction over the Tribe's claims under the second *Montana* exception. That exception provides that tribal courts have authority over nonmember conduct which "threatens or has

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that "where tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts,'" *Strate*, 520 U.S. at 453, 117 S. Ct. 1404 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18, 107 S. Ct. 971, 94 L.Ed.2d 10 (1987)) (alterations omitted).

some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566, 101 S. Ct. 1245. In particular, the district court concluded that by attempting to seize control of the casino and government offices during an intratribal governance dispute, API directly affected both the political integrity and the economic security of the Tribe.

API disputes that the second *Montana* exception provides the tribal courts with jurisdiction. It maintains that the district court erred in its application of *Montana* by overestimating the effect of its conduct on the Tribe's sovereign interests and by considering acts that were irrelevant to the analysis. The Tribe supports the district court's reasoning, maintaining that API's conduct at its facilities interfered with its right to self government and threatened its economic well being.

The starting point for the jurisdictional analysis is to examine the specific conduct the Tribe's legal claims would seek to regulate. The *Montana* exceptions focus on "'the activities of nonmembers' or 'the conduct of non-Indians.'" *Plains Commerce Bank*, 128 S. Ct. at 2720 (quoting *Montana*, 450 U.S. at 565-66, 101 S. Ct. 1245) (emphasis in original). Each claim must be analyzed individually in terms of the *Montana* principles to determine whether the tribal court has subject matter jurisdiction over it. *See Hicks*, 533 U.S. at 367 n. 8, 121 S. Ct. 2304 (limitations on tribal jurisdiction "pertain[ ] to subject-matter, rather than merely personal, jurisdiction"); *Plains Commerce Bank*, 128 S. Ct. at 2724-25 n. 2; *cf. Myers v. Richland County*, 429 F.3d 740, 747-48 (8th Cir. 2005) (examining federal court subject matter jurisdiction claim by claim).

In analyzing the jurisdictional issue we rely on the record developed in the tribal courts and the allegations in the Tribe's complaint. Questions of subject matter jurisdiction often require resolution of factual issues before the court may proceed, *see, e.g.*, *Osborn v. United States*, 918 F.2d 724, 728-30 (8th Cir. 1990), and that is particularly true of inquiries into tribal jurisdiction. It is therefore both necessary and appropriate for the parties and the tribal court to ensure that "a full record [is] developed in the Tribal Court." Nat'l Farmers Union, 471 U.S. at 856, 105 S. Ct. 2447. Here, the parties were afforded discovery in the tribal trial court. API has not contested any of the material allegations made by the Tribe, and we therefore take them as true for present purposes.

The parties disagree about which particular facts are relevant to the *Montana* analysis. API contends that the court should consider only the elements of the tribal regulation or cause of action at issue in evaluating its conduct. Because the tort claims might not in the ordinary course "'imperil the subsistence' of the tribal community," API maintains the tribal courts have no jurisdiction. *Plains Commerce Bank*, 128 S. Ct. at 2726 (quoting *Montana*, 450 U.S. at 566, 101 S. Ct. 1245). The Tribe contends that in deciding the question of jurisdiction the court must focus on what actually occurred at the tribal facilities.

API's theory of tribal jurisdiction suffers from several flaws. The most significant is that it has no grounding in precedent. In support of its theory API does rely on *Plains Commerce Bank*, but its reading of that case does not withstand scrutiny. At issue in *Plains Commerce Bank* was a discrimination claim

based on traditional tribal law. *Id.* at 2725. Rather than focusing on the elements of that tribal claim, the Supreme Court was concerned with the practical regulatory effect the claim would have on the nonmember conduct at issue. It concluded that in effect the plaintiffs' claim "operate[d] as a restraint on alienation" of the non-Indian defendant's land. *Id.* at 2721. *Plains Commerce Bank* thus demonstrates that courts applying *Montana* should not simply consider the abstract elements of the tribal claim at issue, but must focus on the specific nonmember conduct alleged, taking a functional view of the regulatory effect of the claim on the nonmember.

This approach is illustrated in decisions of other courts. For example, in *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849 (9th Cir. 2009), the Ninth Circuit considered the extent of the alleged damage before deciding that a tribe had colorable jurisdiction to enforce regulations prohibiting trespass and requiring a permit to make a fire on tribal land. The court noted that "the regulations at issue are intended to secure the tribe's political and economic well-being, particularly in light of the result of the alleged violations of those regulations in this very case: the destruction of millions of dollars of the tribe's natural resources." *Id.* at 850. The court's decision thus did not rest solely on the categorical elements in the tribal regulations, but on "the circumstances of this case." *Id.*

API's theory also suffers from a conceptual flaw. In maintaining that tribal adjudicatory jurisdiction turns on the elements of the regulation or cause of action the Tribe seeks to enforce, API assumes that the limits on tribal jurisdiction are a function of positive tribal law. That assumption misapprehends the

source of Indian tribes' civil authority, as well as the nature of an appropriate inquiry under *Montana*.

The *Montana* exceptions recognize that the Indian tribes "retain inherent sovereign power," *Montana*, 450 U.S. at 565, 101 S. Ct. 1245, and our task in applying the exceptions is to outline the boundaries of that retained power. Those boundaries are established by federal law, a source of law external to the tribes. *See, e.g.*, *Nat'l Farmers Union*, 471 U.S. at 852, 105 S. Ct. 2447. Positive tribal law, in contrast, is internal to the tribes. It is a manifestation of tribal power, and as such it does not contribute to the external limitations which concern us here. Once it is determined that certain conduct is within the scope of a tribe's power as a matter of federal law, our inquiry is at an end.

This point is illustrated by API's implicit concession that the Tribe might have jurisdiction in this case if only it had written regulations which specifically prohibited "hijacking the casino, interfering with elections, and deposing [the Tribe's] governing council." *See* API Opening Br. at 22. We need not pause to consider how foreseeable such conduct would have been because the absence of such regulations is irrelevant in the factual context of this case. If the Tribe retains the power under *Montana* to regulate such conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through tort claims such as those at issue here.

We conclude that the allegations relevant to our jurisdictional inquiry are not limited to those that track the elements of the Tribe's claims. The context is also significant, and other aspects of the conduct the claims seek to regulate are pertinent to the ex-

tent they demonstrate encroachment upon the tribal sovereign interests recognized by *Montana* and its progeny. We turn then to the Tribe's allegations.

The Tribe's claims arise from two related, but ultimately distinct, courses of conduct which occurred subsequent to the election of the Bear Council and API's agreement with Walker. First, the Tribe alleges that between the time the contract was signed in June and the end of September 2003, API took possession of over $1 million in tribal funds without the authorization of the Tribe's duly elected governing body. The Tribe's conversion claim arises from this transaction (or set of transactions). Second, the Tribe's complaint describes API's raid on the casino and the government offices, leading to the claims for trespass to land, trespass to chattels, and conversion of tribal trade secrets.

We consider the latter claims first. According to the Tribe's allegations, on October 1, 2003 API's armed agents entered onto tribal trust land without permission of the elected governing body, stormed buildings vital to the Tribe's economy and its self government, committed violent torts against tribal members, forcibly seized sensitive information related to the Tribe's finances and gaming operations, and damaged tribal property. The conduct set out in these allegations "menace[d] the 'political integrity, the economic security, [and] the health [and] welfare' of the Tribe to such a degree that it 'imperil[ed] the subsistence' of the tribal community.'" *Plains Commerce Bank*, 128 S. Ct. at 2726 (quoting *Montana*, 450 U.S. at 566, 101 S. Ct. 1245). The Tribe therefore retains the inherent power under the second *Montana* exception to regulate this conduct.

API threatened the health and welfare of the Tribe by organizing a physical attack by thirty or more outsiders armed with batons and at least one firearm against the Tribe's facilities and the tribal members inside, including the duly elected council. While the "generalized threat that torts by or against its members pose for any society[ ] is not what the second *Montana* exception is intended to capture," *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 943 (9th Cir. 2009), the Tribe's allegations describe no ordinary torts. To the contrary, API directly threatened the tribal community and its institutions. Its agents' actions against the Tribe's newly elected council and its supporters during the dawn takeover could easily have led to wider violence. Conduct reasonably likely to result in violence on tribal lands sufficiently threatens tribal health and welfare to justify tribal regulation. *See Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 593 (9th Cir. 1983).

As alleged, API's conduct also threatened the political integrity and economic security of the Tribe. Its apparent purpose in raiding the Tribe's facilities was to seize control of the tribal government and economy by force.[6] The dawn attack was directed at the Tribe's community center-the seat of tribal government-and the casino, which the tribal appellate court characterized as "the Tribe's economic engine." Tribal Court of Appeals Decision at 16. As it appears from the allegations, the raid sought to return the

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[6] API's alleged conduct fits the dictionary definition of an attempted coup d'état: a "sudden ... change of government through seizure of power." Black's Law Dictionary 378 (8th ed. 2004).

Walker Council to power despite the majority's rejection of its leadership in the May election. This was a direct attack on the heart of tribal sovereignty, the right of Indians "to protect tribal self-government." *Montana*, 450 U.S. at 564, 101 S. Ct. 1245.[7]

Finally, there remains "the critical importance of land status" to questions of tribal jurisdiction under *Montana*. *Plains Commerce Bank*, 128 S. Ct. at 2725. Here, the Tribe does not seek to assert jurisdiction over non Indian fee land. The facilities API raided are on tribal trust land. The Tribe's trespass and trade secret claims thus seek to regulate API's entry and conduct upon tribal land, and they accordingly "stem from the tribe's 'landowner's right to occupy and exclude.'" *Elliott*, 566 F.3d at 850 (quoting *Hicks*, 533 U.S. at 359, 121 S. Ct. 2304). A "tribe's 'traditional and undisputed power to exclude persons' from tribal land ... gives it the power to set conditions on entry to that land." *Plains Commerce Bank*, 128 S. Ct. at 2723 (quoting *Duro v. Reina*, 495 U.S. 676, 696, 110 S. Ct. 2053, 109 L.Ed.2d 693 (1990)). Tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner. *See Hicks*, 533 U.S. at 370, 121 S. Ct. 2304 ("[T]ribal ownership is a factor in the *Montana* analysis, and a factor significant enough that it may sometimes be dispositive.") (ellipsis and quotation marks omitted); *Strate*, 520

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[7] No jurisdictional significance has been established by the fact that the BIA and NIGC still recognized the Walker Council at the time of the raid. As discussed in Part III.B, infra, these federal agencies are without power to interfere in an intratribal governance dispute. Their recognition could not give API license to do what the agencies themselves could not.

U.S. at 454, 117 S. Ct. 1404; *Elliott*, 566 F.3d at 849-50. Adjudication of the trespass and trade secret claims is accordingly well within the Tribe's retained power under *Montana*.

We conclude that because API's forceful intervention on October 1, 2003 threatened the "political integrity, the economic security, [and] the health [and] welfare" of the Tribe, *Montana*, 450 U.S. at 566, 101 S. Ct. 1245, as well as its rights as a landowner, the tribal courts may exercise jurisdiction over the claims that arise out of that conduct. *See Plains Commerce Bank*, 128 S. Ct. at 2724, 2726 (tribes retain "inherent sovereign authority to set conditions on entry, preserve self-government, [and] control internal relations"). The Tribe's claims for trespass to tribal land and chattels and conversion of tribal trade secrets grow out of this sovereign authority.

The Tribe's claim for conversion of tribal funds is materially different from the other alleged torts, however. The conversion claim does not appear to arise directly out of what occurred during the October 1 raid. It arises from the payment of tribal funds to API under its contract with Walker. According to the tribal trial court's factual findings, all of the money the Tribe now seeks to recover had been paid to API by September 30, the day before the raid occurred. The district court may have overlooked that fact since it focused its discussion entirely on API's conduct on October 1. It is of course possible that API was paid in advance for planning and executing the raid, but that has not been alleged.

In order to establish jurisdiction over the conversion claim under the second *Montana* exception, the Tribe must show that the conduct it seeks to regulate occurred within the Meskwaki Settlement, for "

Montana and its progeny permit tribal regulation of nonmember conduct inside the reservation." *Plains Commerce Bank*, 128 S. Ct. at 2721 (second emphasis added). The conduct the conversion claim seeks to regulate most directly is API's unauthorized receipt and retention of tribal funds. *See, e.g.*, Restatement (Second) of Torts §§ 222A, 229; *cf. United States v. Janis*, 556 F.3d 894, 898 (8th Cir. 2009) (defendant's "receipt and retention" of tribal funds transferred in violation of tribal policy was "conversion" under 18 U.S.C. § 1163). The Tribe makes no allegation that the receipt or retention of the funds occurred within the Meskwaki Settlement, however, so we cannot conclude that the conduct most directly regulated by the conversion claim occurred on tribal land.

Nor has the Tribe adequately delineated an indirect relationship between the conversion claim as a whole and API's conduct on tribal land, for it remains unclear what portion of the allegedly converted funds may relate to the October 1 raid, as opposed to other services API might have performed under the contract with Walker. The tribal appellate court stated that the "Walker Council paid API these funds in exchange for API's performance of some of the actions" of October 1, Tribal Court of Appeals Decision at 16, but the record does not illuminate the issue any further. The tribal trial court's only relevant factual finding was that API received $1,022,171.26 in tribal funds between June 30, 2003 and September 30, 2003. Because we cannot determine what services these funds paid for, we cannot examine what conduct by API the conversion claim seeks to regulate.

That some of the funds likely relate to the Octo ber 1 raid is not enough to sustain jurisdiction over

the claim as a whole, for "when it comes to tribal regulatory authority, it is not 'in for a penny, in for a Pound.'" *Plains Commerce Bank*, 128 S. Ct. at 2724 (quoting Atkinson, 532 U.S. at 656, 121 S. Ct. 1825). We conclude that the Tribe has failed to carry its burden of establishing adjudicatory jurisdiction over the conversion claim under the second *Montana* exception.

The question remains, however, whether the first *Montana* exception could provide tribal court jurisdiction over the conversion claim. That exception recognizes tribal power to regulate nonmembers when they "enter consensual relationships with the tribe or its members." *Montana*, 450 U.S. at 565, 101 S. Ct. 1245. The tribal appellate court concluded that the first exception did not apply because the Tribe's claims "are premised on lack of consent and turn on the Tribe's claim that there was no valid Contract" between it and API. Tribal Court of Appeals Decision at 16 (emphasis in original). Although the district court expressed agreement with that proposition, it did not analyze or ultimately decide whether the first *Montana* exception applies to any of the Tribe's claims. The Tribe now urges that the first exception establishes jurisdiction over all of its claims. API disagrees.

Whether the contract between API and Walker was binding on the Tribe is an issue separate from the question of whether the contract could establish tribal court jurisdiction over the Tribe's claims, for the consensual relationship contemplated by the first *Montana* exception may be with the Tribe itself "or its members." *Montana*, 450 U.S. at 565, 101 S. Ct. 1245. Even if the contract did not bind the Tribe, the operative question for jurisdictional pur-

poses is whether the conversion claim has a sufficient nexus to the consensual relationship between Walker and API. *Atkinson*, 532 U.S. at 656, 121 S. Ct. 1825; *see Nord*, 520 F.3d at 856. We decline to answer that question without the benefit of analysis by the district court. We therefore conclude that a remand is necessary so that the district court may consider the applicability of the first *Montana* exception to the Tribe's conversion claim.

III.

API contends that regardless of whether the tribal courts have subject matter jurisdiction under *Montana*, its contract with Walker binds the Tribe and requires arbitration of the claims brought against it. After concluding as a matter of tribal law that the Bear Council had been legally installed to lead the Tribe in the May 2003 election, the tribal courts determined that Walker had no authority to bind the Tribe to the contract he subsequently entered into in June. The district court deferred to that determination of tribal law and therefore agreed that the arbitration clause in the contract was not enforceable against the Tribe. Because the duly elected tribal authority had not agreed to the arbitration provision, the district court concluded that the Tribe's sovereign immunity barred API's claim for enforcement of the arbitration clause. API continues to maintain that the arbitration clause is binding, particularly since some federal agencies continued to recognize Walker as the tribal chairman at the time he entered into the contract with it.

A.

The parties disagree about the scope of our review of API's arbitration claim. API maintains that

we must review de novo all matters of federal law decided by the tribal court including the arbitration issue. The Tribe argues however that our review is limited to determining whether the tribal courts had jurisdiction over the issue. If they did, the Tribe contends, we should accord preclusive effect to their determination that the contract was invalid.

The Supreme Court's guidance in this area has been limited. It held in *Iowa Mutual Insurance Co. v. LaPlante* that "[u]nless a federal court determines that the Tribal Court lacked jurisdiction, ... proper deference to the tribal court system precludes relitigation of issues raised by the [underlying] claim and resolved in the Tribal Courts." 480 U.S. at 19, 107 S. Ct. 971. That decision has been understood as establishing "the rule that federal courts may not readjudicate questions-whether of federal, state or tribal law-already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason." *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002).[8] The Ninth Circuit thus reviews de novo a tribal court's resolution of those matters of federal law which are relevant to the tribal court's jurisdiction, but gives preclusive effect to tribal judgments on other issues under a comity

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[8] *See also* Timothy W. Joranko, Exhaustion of Tribal Remedies in the Lower Courts. After *National Farmers Union* and *Iowa Mutual*: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System, 78 Minn. L.Rev. 259, 295 (1993) (" Iowa Mutual makes clear that the parties may not relitigate their federal claims beyond the jurisdictional challenge, unless and until the federal court determines that the tribal court lacked jurisdiction over the dispute.").

analysis. *See id.* at 903-04; *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997).

We stated in dictum in *Prescott v. Little Six, Inc.* that "when the tribal court applies federal law [its] determinations are accorded no deference and are reviewed by the district court de novo," citing *Duncan Energy Co. v. Three Affiliated Tribes of the Ft. Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994). *Prescott*, 387 F.3d at 757. In Duncan the court mentioned the de novo standard only in the course of discussing tribal court jurisdictional determinations, however, and it relied on *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990). *See Duncan*, 27 F.3d at 1300. The Ninth Circuit has subsequently explained that FMC did not require a de novo standard for all federal issues, but "merely established a de novo standard of review for legal questions relevant to a tribal court's decision regarding tribal jurisdiction." *Coeur d'Alene Tribe*, 295 F.3d at 904 (emphasis in original).[9]

Even if our precedent provides uncertain guidance on the standard for review of tribal court decisions of federal law issues, we need not linger over the question here. The district court determined that

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[9] A de novo standard of review for all questions of federal law decided by tribal courts would also appear to take inadequate account of the fact that "the tribes remain quasi-sovereign nations which ... are in many ways foreign to the constitutional institutions of the Federal and State Governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71, 98 S. Ct. 1670, 56 L.Ed.2d 106 (1978); *see also Duncan*, 27 F.3d at 1302 (Loken, J., concurring) ("I do not agree that ... we conduct some sort of direct review of the tribal court.... . I know of no statute giving the district and circuit courts jurisdiction to review tribal court decisions.").

the question of whether Walker had authority to bind the Tribe to the June 2003 agreement with API is purely a matter of tribal law. If that conclusion was correct, we need not decide in this case whether de novo review applies to tribal court decisions of nonjurisdictional issues of federal law. The rule is clear that federal courts do not conduct de novo review over tribal court rulings under tribal law. *Prescott*, 387 F.3d at 756; *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8th Cir. 1993), *cert. denied*, 512 U.S. 1236, 114 S. Ct. 2741, 129 L.Ed.2d 861 (1994).

B.

API argues that the district court should not have deferred to the tribal courts' conclusion about the validity of the contract because that issue is governed by federal law, not tribal law. API contends that Walker had authority under federal law to take any action necessary to operate the casino, including contracting with API on behalf of the Tribe, because the BIA and NIGC still recognized the Walker Council as the Tribe's governing body through the summer of 2003. API's reliance on federal agency recognition of the Walker Council is misplaced.

Of special significance is the long established principle that "[t]ribal election disputes, like tribal elections, are key facets of internal tribal governance and are governed by tribal constitutions, statutes, or regulations." Cohen § 4.06[1][b][i]. We have reaffirmed this rule in relation to the very governance dispute underlying this case. *See Meskwaki Casino Litig.*, 340 F.3d at 763-64. Because tribal governance disputes are controlled by tribal law, they fall within the exclusive jurisdiction of tribal institutions, *see id.*, and the BIA's recognition of a member or faction

is not binding on a tribe, *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983).

While the BIA may at times be obliged to recognize one side in a dispute as part of "its responsibility for carrying on government relations with the Tribe," such recognition is made only on "an interim basis." *Id.* Once the dispute is resolved through internal tribal mechanisms, the BIA must recognize the tribal leadership embraced by the tribe itself. *Id.*; *see also Wheeler v. U.S. Dep't of the Interior, Bureau of Indian Affairs*, 811 F.2d 549, 552-53 (10th Cir. 1987); Cohen § 4.06[1][b][ii]. The BIA recognizes the force of these principles. *See Wanatee v. Acting Minneapolis Area Director, BIA*, 31 I.B.I.A. 93, 95 (Interior Bd. of Indian Appeals July 30, 1997).

It is plain, then, that whether Walker was properly removed from office and whether he had general authority to act on behalf of the Tribe in a governmental capacity are pure questions of tribal law, beyond the purview of the federal agencies and the federal courts. API concedes this proposition as it must. It argues, however, that federal law empowered Walker in a more limited and specific manner. API contends that NIGC's notice of violation and order closing the casino authorized Walker to take self help remedies in retaking control, pointing in particular to a statement in the notice of violation that the Bear Council's occupation of the casino "leaves the federally recognized government unable to regain control without the use of force."[10] More

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[10] Notice of Violation, No. NOV-03-02, at 2 (NIGC Apr. 30, 2003), *available at* http://www.nigc.gov/Reading_Room/Enforcement_Actions.aspx.

broadly, API contends that because Indian gaming is a federally regulated activity, the federal agencies' recognition of Walker empowered him to act on behalf of the Tribe for purposes of operating the casino, and thus to enter into the contract with API despite having been replaced by the election of the Bear Council.

As for the first contention, the NIGC actions had neither the purpose nor the legal consequences API ascribes to them. The notice of violation and closure order disclose no intent to empower Walker to employ force by outsiders to retake the casino. To say that the Bear Council was not authorized at that point to operate the casino was not to say that Walker could do whatever he thought necessary to reopen it. The point of the NIGC reference about the potential for the use of force was that the situation at the casino posed a threat to public safety, thus violating federal gaming law and regulations. API seeks to justify its raid on the Tribe's facilities on tribal trust land by seizing on a few words of the NIGC order isolated from their context. The NIGC did not authorize the use of force in its notice, and certainly not by private actors employed by one faction in an intratribal dispute.

Moreover, the NIGC lacked the power to authorize Walker to hire API with tribal funds to conduct its raid. As the notice of violation itself makes clear, the "NIGC defers to the Secretary of the Interior," acting through the BIA, in determining "which faction should be recognized as the tribal government." Notice of Violation at 1 (citing 25 U.S.C. § 2703(5)(A)). Any recognition of Walker at this point had no special force. NIGC simply deferred the issue to the BIA, which acknowledges that it lacks the

power to determine tribal leadership. It must nonetheless still conduct government to government relations on an interim basis during a tribal leadership dispute. *See Wanatee*, 31 I.B.I.A. at 95.

API's more general argument is that federal law governs the validity of the contract between API and Walker because its subject matter was operation of a federally regulated casino. This argument is foreclosed by our precedent. We have held under circumstances similar to those here, that whether a former tribal leader has authority to bind his tribe to a casino management contract is a matter of tribal law. In *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996), the tribes had entered into a casino management contract with the Lien Company. *Id.* at 1414. The tribal leader who had executed the agreement subsequently lost his bid for reelection, and the new leadership claimed he had not been authorized to bind the tribe. *Id.* at 1415-16. We reversed the district court's determination that the NIGC had "exclusive initial jurisdiction to determine the validity of the contract." *Id.* at 1416. We concluded to the contrary that "the legal validity of the management contract [was] beyond the authority of the NIGC," and that jurisdiction to determine its validity lay in the tribal court. *Id.* at 1417. Further, "the issue of the contract's validity [did] not raise a federal question per se." *Id.* at 1421.

Prescott v. Little Six, Inc. resolved a parallel choice of law problem in a similar manner. In *Prescott*, former employees of Little Six (a tribal corporation organized under tribal law to run the tribe's casino), sued to recover payments under draft employee benefit plans created by the company. 387 F.3d at 754. Little Six claimed that the benefit plans

had not been created in accordance with tribal corporate law and were therefore not binding. *Id.* The district court concluded that because the benefit plans were governed by ERISA, their validity was a question of federal law. *Id.* at 757. We reversed, recognizing that "the initial, and dispositive, issue ... was whether a valid and enforceable benefits arrangement existed." *Id.* That issue was "a matter governed by tribal law" and we therefore deferred to the tribal court's determination that the draft plans were invalid. *Id.* at 757-58.

The present case is on all fours with *Bruce H. Lien* and *Prescott*. API recognizes that Walker's authority to act on behalf of the Tribe in general is a matter of tribal law. Our decisions in *Bruce H. Lien* and *Prescott* repudiate any notion that federal regulation of gaming could create some special sphere of federal law by which Walker could be empowered to bind the Tribe after it had elected new leaders.

API also argues that even if Walker was without authority to bind the Tribe to the agreement as a whole, he had independent federal authority to waive the Tribe's sovereign immunity because tribal sovereign immunity is a creature of federal law. This is essentially the same argument API offers with respect to the contract as a whole, and we reject it for the same reasons. The fact that federal law provides for tribal sovereign immunity did not cloak Walker with authority to waive the Tribe's immunity, just as federal regulation of gaming did not federalize the Tribe's internal governance disputes as they related to casino management. Walker simply lacked authority to act on behalf of the Tribe in any capacity, and this "calls into question all provisions" in the contract, "including provisions relating to arbitration

[and] sovereign immunity." *Bruce H. Lien*, 93 F.3d at 1417.

API advances a number of policy based arguments in support of its position. It contends for example that the inability of third parties to rely on federal agency recognition of a particular tribal government could interfere with the provision of services to Indian tribes. Such contentions are irrelevant, for the ultimate flaw in API's argument is that it points to no federal statute, treaty, or regulation manifesting congressional intent to authorize the encroachment upon tribal sovereignty that API proposes.

It is Congress-not the federal judiciary-which enjoys "plenary and exclusive" power over the Indian tribes, *United States v. Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628, 158 L.Ed.2d 420 (2004); *see Williams*, 358 U.S. at 223, 79 S. Ct. 269; *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S. Ct. 216, 47 L.Ed. 299 (1903), and thus "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." Santa Clara Pueblo, 436 U.S. at 60, 98 S. Ct. 1670. There is no indication that Congress has granted the BIA or NIGC the authority API claims for them, or that it intended the Indian Gaming Regulatory Act to displace the right of tribal members to select the leaders who will act on their behalf. Absent clear evidence of legislative intent, we will not infer that Congress has so drastically curtailed tribal sovereignty.

The district court properly deferred to the tribal courts' determination that the June 2003 agreement between Walker and API did not bind the Tribe. *See*

Prescott, 387 F.3d at 758. Because the Tribe did not enter into any agreement with API, it has not waived its sovereign immunity, and it is therefore immune from suit on the contract. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760, 118 S. Ct. 1700, 140 L.Ed.2d 981 (1998). Accordingly, the district court did not err in dismissing API's claim for enforcement of the arbitration agreement.

IV.

For the foregoing reasons, we affirm the judgment of the district court insofar as it held that the courts of the Sac and Fox Tribe may exercise adjudicatory jurisdiction over the Tribe's claims against API for trespass to land, trespass to chattels, and conversion of tribal trade secrets. We also affirm the judgment of the district court dismissing API's claim for an order compelling arbitration.

We reverse and vacate only that portion of the judgment which concluded that the Tribal Court has jurisdiction under the second *Montana* exception over the Tribe's claim for conversion of tribal funds, and we remand to the district court the question of whether tribal court jurisdiction exists over that claim under the first *Montana* exception.

United States District Court,
N.D. Iowa, Cedar Rapids Division.

ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC., Plaintiff,

v.

SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA, Defendant.

No. 05-CV-168-LRR.o

June 18, 2009.

LINDA R. READE, Chief Judge.

I. INTRODUCTION

The matters before the court are the "Motion to Dismiss" (docket no. 48), filed by Defendant Sac & Fox Tribe of the Mississippi in Iowa ("Tribe"), and the "Motion for Partial Summary Judgment on Jurisdictional Grounds" (docket no. 63) ("Summary Judgment Motion"), filed by Plaintiff Attorney's Process and Investigation Services, Inc. ("API").

II. RELEVANT PROCEDURAL BACKGROUND

A. Intra-Tribal Governmental Dispute[1]

In 2002, Alex Walker, Jr. was the leader of the seven-member elected council that governs the Tribe. On September 26, 2002, some Tribe members became dissatisfied with this "Walker Council" and submitted recall petitions for its members.

On October 10, 2002, the Walker Council purported to accept the recall petitions. However, the Walker Council never set recall elections. On March 4, 2003, the Walker Council rejected the recall petitions.

Also on March 4, 2003, the Tribe's Hereditary Chief Old Bear appointed an interim tribal council. The "Bear Council" consisted of Hereditary Chief Old Bear and six other Tribe members.

On March 26, 2003, Hereditary Chief Old Bear administered oaths of office to the Bear Council.[2] On

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[1] The court's recitation of the facts is drawn from the record before the court and the Tribal Court's record. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 21, 107 S. Ct. 971, 94 L.Ed.2d 10 (1987) ("'[T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed.'") (quoting *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856, 105 S. Ct. 2447, 85 L.Ed.2d 818 (1985)). The court also notes the parties do not dispute the material facts at issue in this case-only their legal implication. *See* Brief in Support of Summary Judgment Motion (docket no. 63-5), at 3 (discussing Tribal Court of Appeals's factual findings).

[2] On April 8, 2003, the Walker Council filed a declaratory judgment suit in this court against the Bear Council. The Walker Council asked this court to determine which council

(footnote continued on next page)

April 14, 2003, some members of the Tribe signed a declaration of support for Hereditary Chief Old Bear's actions. These same Tribe members also agreed that none of the members of the Walker Council were qualified to serve on the Tribe's council.

On May 22, 2003, the Tribe held a special election to resolve the intra-tribal dispute. The Tribe elected all seven members of the Bear Council. In the fall of 2003,[3] the Tribe held another election and confirmed the Bear Council in its entirety.

B. Tribal Court Complaint

On August 3, 2005, the Bear Council filed a tort action on behalf of the Tribe in the Court of the Sac & Fox Tribe of the Mississippi in Iowa ("Tribal Court"). *See Sac & Fox Tribe of the Miss. in Iowa v. API*, No. API-CV-Damages-2005-01 (Court of the Sac & Fox Tribe of the Mississippi in Iowa). The Tribe alleged trespass to land, trespass to chattel, theft of tribal funds and misappropriation of trade secrets.

On September 23, 2005, API filed a motion in the Tribal Court. API asked the Tribal Court to dismiss the Tribe's complaint, claiming the Tribal Court lacked subject matter jurisdiction over API.

C. Federal District Court Complaint

On October 21, 2005, API filed a Complaint (docket no. 2) in this court. The Complaint alleges

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was authorized to govern the Tribe. The court dismissed the suit for lack of subject matter jurisdiction. *Sac & Fox Tribe of the Miss. in Iowa v. Bear*, 258 F.Supp.2d 938 (N.D.Iowa 2003) (Reade, C.J.), *aff'd*, 439 F.3d 832 (8th Cir. 2006).

[3] The date of the fall 2003 election is unclear from the record.

the Tribe, acting under the leadership of the Bear Council, breached a contract and asks the court to bar the Tribe's lawsuit in the Tribal Court. Additionally, API asks the court to compel arbitration.

On November 15, 2005, the court entered an Order (docket no. 24). The court stayed the instant action pending exhaustion of remedies in the Tribal Court.

D. Tribal Court Considers Jurisdiction Issue

On March 26, 2008, the Tribal Court entered an order ("Tribal Court Order") (docket no. 48-5, Ex. 7) in which it denied API's motion to dismiss. The Tribal Court concluded it could exercise civil jurisdiction over API.

On December 23, 2008, the Appellate Court of the Sac & Fox Tribe of the Mississippi in Iowa ("Tribal Court of Appeals") affirmed the Tribal Court. Tribal Court of Appeals Order (docket no. 48-5, Ex. 8).

On January 20, 2009, the Tribal Court stayed its proceedings pending this court's resolution of issues related to the Tribal Court's exercise of civil jurisdiction over API.

E. API Appeals Tribal Court Decision to Federal District Court

On January 2, 2009, API filed a Motion to Reopen (docket no. 37) in the instant action. On January 7, 2009, the court granted the Motion to Reopen (docket no. 41) and lifted its stay.

On January 27, 2009, the Tribe filed an Answer (docket no. 49) in which it denies the substance of the Complaint and alleges that the court lacks subject matter jurisdiction over this action. That same date, the Tribe filed its Motion to Dismiss.

On March 1, 2009, API filed the Summary Judgment Motion. The Summary Judgment Motion also contains a resistance to the Motion to Dismiss. On March 11, 2009, the Tribe filed a Reply (docket no. 69) in support of its Motion to Dismiss. On April 2, 2009, the Tribe filed a Resistance (docket no. 74) to the Summary Judgment Motion. On April 13, 2009, API filed a Reply (docket no. 77-2) in support of its Summary Judgment Motion. On May 8, 2009, the Tribe filed a corrected version of its Resistance to the Summary Judgment Motion (docket no. 86).

API requests oral argument on the Motion to Dismiss and the Summary Judgment Motion (together, "Motions"). The court finds oral argument is not necessary. The Motions are fully submitted and ready for decision.

III. RELEVANT FACTUAL BACKGROUND

A. Parties

API is a security services corporation with its principal place of business in Wisconsin. The Tribe is a federally recognized Indian Tribe whose members live on the Meskwaki Settlement ("Settlement") in Tama County, Iowa. The Tribe owns the Meskwaki Bingo•Casino•Hotel ("Casino") under a state-tribal compact with the State of Iowa. *See In re Sac & Fox Tribe of the Miss. of Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 751 (8th Cir. 2003).

B. Casino

The Casino is the Tribe's "economic engine" and is located on the Settlement. Tribal Court of Appeals Order at 16. The National Indian Gaming Commission ("NIGC") regulates the Casino.

C. Dispute

From September 2002 through the fall of 2003, the Tribe was embroiled in the intra-tribal governmental dispute discussed above. The Bear Council ultimately prevailed over the Walker Council. The Bear Council has retained control of the Tribe's government and the Casino during the pendency of the instant action.

D. Agreement

In June of 2003, after the Bear Council had been elected in the May 2003 elections, the Walker Council continued to try to do business on behalf of the Tribe. On June 16, 2003, the Walker Council purported to enter into an agreement with API on behalf of the Tribe ("Agreement") (docket no. 2-2, Ex. A). The Agreement purported to engage API on behalf of the Tribe for "investigation, security and law enforcement consulting services[.]" Agreement at 1. More specifically, the Agreement stated API would "perform services directly relating to the investigation of a takeover by dissidents at the [Casino] " investigate "individuals involved in the unlawful acts against the Tribal Government" and "[i]nvestigate allegations of unlawful acts and tribal policy violations of the dissident group involving Tribal funds[ ] and gaming operations." *Id.* at 1-2.

The Agreement contained an arbitration clause. The arbitration clause states, in relevant part:

> i. The parties shall make efforts to settle through dialogue and negotiation any disputes that may arise out of this Agreement. However, should such efforts fail after thirty (30) days, the dispute shall be submitted to arbitration, which shall be conducted in Des Moines, Iowa, in accordance

> with the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be heard before one arbitrator chosen by consensus of the parties. If the parties cannot mutually agree on an arbitrator, the arbitrator shall be chosen in accordance with the Rules of the American Arbitration Association. The decision of the arbitrator shall be final and binding upon the parties.
>
> ii. [...] Judgment on the award of the arbitrator may be entered by the Federal District Court for the Northern District of Iowa under the Federal Arbitration Act or [an] Iowa state court pursuant to Iowa law. For this purpose, the Tribe and API hereby irrevocably consent to the jurisdiction over their persons of such courts for such purpose, including to enter judgment on an arbitration award, and waive any defense based on improper venue, inconvenient venue, or lack of personal jurisdiction.
>
> iii. The failure of any party to submit voluntarily to arbitration shall be deemed to be a breach of this Agreement. Provided, that if either party has a good faith position that a dispute does not arise under this Agreement, that party may file an action in the Federal District Court for the Northern District of Iowa, or the Iowa state courts, to determine whether the dispute is the proper subject of arbitration under this Agreement.

Id. at 5.

At the time API executed the Agreement, it was under the impression that the Walker Council was the Tribe's true governing body. However, API was incorrect. On March 26, 2008, the Tribal Court held

the Walker Council had no authority to enter into the Agreement on behalf of the Tribe because the Bear Council had exclusive governing power over the Tribe at the time the Agreement was executed. The Tribal Court held that, consequently, the Agreement was invalid and unenforceable against the Tribe. This decision was affirmed by the Tribal Court of Appeals.

E. Bear Council's Communications with Federal Agencies

Hereditary Chief Old Bear and others communicated with various federal agencies regarding the newly installed Bear Council. However, these federal agencies refused to recognize the Bear Council for purposes of gaming activities and other federal matters until after the second election in the fall of 2003. For instance, on March 17, 2003, Hereditary Chief Old Bear received a letter from the United States Department of the Interior Bureau of Indian Affairs ("BIA") in which the BIA stated it could not involve itself in the dispute over whether the Walker Council or Bear Council was the Tribe's true governing council. In this letter, the BIA also indicated that it recognized the Walker Council as the Tribe's governing body. On April 1, 2003, Hereditary Chief Old Bear received a letter from the United States Department of the Interior Office of the Secretary ("Secretary") in which the Secretary stated it continued to recognize the Walker Council as the Tribe's official leadership. On May 9, 2003, Hereditary Chief Old Bear received a letter from the BIA stating it continued to recognize the Walker Council as the governing Tribal authority. On May 23, 2003, Hereditary Chief Old Bear received a letter from the Secretary stating that, because the May 22, 2003

election had not been held in accordance with tribal law, the Department would not recognize the results of that election.

F. API Raids the Casino

On October 1, 2003, API raided the Casino pursuant to the Agreement with the Walker Council and without authority from the Bear Council. At the time of the raid, the Bear Council had governing control over the Casino. Approximately thirty individuals associated with API stormed the Casino. Many were armed with batons. At least one individual affiliated with API had a firearm. The Tribe alleges API seized tribal property, assaulted and falsely imprisoned Tribe members and employees, intentionally damaged Tribal property and misappropriated the Tribe's trade secrets. Additionally, API took control of the Tribe's gaming information, including the Tribe's financial records, surveillance, ongoing gaming investigations, personnel files and legal files.

IV. ANALYSIS

A. Parties' Arguments

In the Complaint, API asks the court for a declaratory judgment that the Tribal Court may not exercise civil jurisdiction over API. API alleges the Tribe breached the Agreement and seeks damages for the breach.

In its Motion to Dismiss, the Tribe argues the court must dismiss the instant action because (1) the court lacks subject matter jurisdiction over the dispute; (2) sovereign immunity bars the Tribe from being sued in the instant action; and (3) API has failed to state a claim upon which relief can be granted. The Tribe also argues the Tribal Court has civil ju-

risdiction over API with respect to the Tribe's tort claims.

In its Motion for Summary Judgment, API argues (1) the court has subject matter jurisdiction over the Complaint; (2) the Walker Council waived the Tribe's sovereign immunity in the Agreement pursuant to the arbitration clause; and (3) the Tribal Court has no civil jurisdiction over API. The court examines each of these arguments below.

B. Subject Matter Jurisdiction and Sovereign Immunity

The Tribe argues the court must dismiss the instant action for lack of subject matter jurisdiction because it "has not waived its sovereign immunity from this suit." Brief in Support of Motion to Dismiss (docket no. 48-2), at 8. The Tribe conflates subject matter jurisdiction and sovereign immunity. As the Eighth Circuit Court of Appeals noted,

> [S]overeign immunity is jurisdictional in nature. Sovereign immunity, however, is not of the same character as subject matter jurisdiction. First of all, tribal sovereign immunity may be waived in certain circumstances and is subject to the plenary power of Congress. Lack of subject matter jurisdiction, on the other hand, may not be waived. Second, sovereign immunity operates essentially as a party's possible defense to a cause of action. In contrast, subject matter jurisdiction is primary and an absolute stricture on the court. Finally, a waiver of sovereign immunity cannot extend a court's subject matter jurisdiction.
>
> We find, therefore, that sovereign immunity is a jurisdictional consideration separate from subject matter jurisdiction[.]

In re Prairie Island Dakota Sioux, 21 F.3d 302, 304-05 (8th Cir. 1994) (internal citations omitted); *see also Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous.*, 207 F.3d 21, 28 (1st Cir. 2000) ("[A]lthough tribal sovereign immunity is jurisdictional in nature, consideration of that issue always must await resolution of the antecedent issue of federal subject-matter jurisdiction."). Accordingly, the court first considers whether it has subject matter jurisdiction over the instant action and then proceeds to determine whether sovereign immunity applies.

C. Subject Matter Jurisdiction

The party seeking to establish the court's subject matter jurisdiction, API, bears the burden of proving it. *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). API alleges the court has subject matter jurisdiction over the Tribe under Count I, the request to bar the Tribal Court's exercise of civil jurisdiction over API, pursuant to 28 U.S.C. § 1331. API alleges the court has supplemental jurisdiction over Count II, its breach of contract claim, pursuant to 28 U.S.C. § 1367(a).[4]

1. Count I: request for declaratory judgment

The court has federal question subject matter jurisdiction over Count I, API's request for a declaratory judgment concerning the Tribal Court's exercise

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[4] The Complaint contains a typographical error. In its jurisdictional statement, API alleges the court derives supplemental jurisdiction over the breach of contract claim pursuant to "28 U.S.C. § []1365(a)." Complaint at ¶ 7. Section 1365(a) governs a court's jurisdiction over actions brought by the United States Senate, not supplemental jurisdiction.

of civil jurisdiction over API. Count I requires the court to decide whether the Tribal Court may exercise civil jurisdiction over API, a non-Indian. "The question of whether an Indian tribe has the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is a federal question under 28 U.S.C. § 1331." *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 513 (8th Cir. 1989) (citing *Nat'l Farmers Union*, 471 U.S. at 852).

2. Count II: breach of contract

As in other cases, to exercise supplemental jurisdiction over a claim against an Indian tribe, "the 'claims within the action' must 'derive from a common nucleus of operative fact.'" *Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation*, 495 F.3d 1017, 1024 (8th Cir. 2007) (quoting *Myers v. Richland County*, 429 F.3d 740, 745 (8th Cir. 2005)); *see also Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 936 (7th Cir. 2008) (exercising supplemental jurisdiction over plaintiff's state law contract claim against a tribe in Indian Gaming Regulatory Act case). "A plaintiff's claims derive from a common nucleus of operative fact if the 'claims are such that [the plaintiff] would ordinarily be expected to try them all in one judicial proceeding.'" *OnePoint Solutions, LLC v. Borchert*, 486 F.3d 342, 350 (8th Cir. 2007) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L.Ed.2d 218 (1966)).

The torts forming the basis of the Tribe's claims against API are all rooted in the Agreement, because API raided the Casino pursuant to its terms. The court is satisfied that API's claims arise from a common nucleus of operative fact. Therefore, the

court shall exercise supplemental jurisdiction over Count II.

D. Sovereign Immunity

Next, the court turns to consider whether sovereign immunity bars the court's exercise of jurisdiction in this case. "While federal jurisdiction exists [...], [a tribe]'s sovereign immunity [may] still bar[ ] claims from being brought against it unless [its] immunity has been waived by the tribe or unequivocally abrogated by Congress." *Ho-Chunk Nation*, 512 F.3d at 936 (internal quotation marks omitted). "It is well settled 'that Indian tribes possess the same common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Mo. River Servs., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 852 (8th Cir. 2001) (quoting *Val-U Constr. Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 576 (8th Cir. 1998)). "[A] tribe may waive its immunity, but 'a tribe's waiver must be "clear."'" *Id.* (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418, 121 S. Ct. 1589, 149 L.Ed.2d 623 (2001)). A tribe may waive its immunity in an arbitration agreement. *Id.*

The Tribe argues sovereign immunity bars the court from adjudicating both Count I and Count II. The court examines the application of the doctrine of sovereign immunity as to each count separately.

1. Count I: request for declaratory judgment

The Tribe argues that sovereign immunity bars Count I, that is, API's request for a declaratory judgment concerning the propriety of the Tribal Court's exercise of civil jurisdiction over API.

Although there do not appear to be any cases discussing whether sovereign immunity bars a federal district court from considering this issue, controlling precedent clearly presumes that sovereign immunity does not bar a district court from reviewing a tribal court's decision to exercise civil jurisdiction over a non-member. *See, e.g., Bruce H. Lien*, 93 F.3d at 1421 ('7F[T]he tribal courts themselves are given the first opportunity to address their [civil] jurisdiction and explain the basis (or lack thereof) to the parties. *As a jurisdictional inquiry, appeal of this issue may be had in the federal district court.")* (internal citations omitted) (emphasis added); *Duncan Energy*, 27 F.3d at 1300 (8th Cir. 1994) ("Once tribal court remedies have been exhausted, a[t]ribal [c]ourt's determination of tribal [civil] jurisdiction may be reviewed in the federal district court.") (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19, 107 S. Ct. 971, 94 L.Ed.2d 10 (1987)). The court also notes that, if sovereign immunity barred this claim, then no federal district court could consider this issue. The wealth of federal case law concerning tribal court civil jurisdiction over non-members demonstrates that sovereign immunity does not bar a district court from considering this matter.

To be sure, principles of sovereign immunity prevent a federal district court from considering this question before a tribal court has considered it. In November of 2005, this court stayed the instant action because the parties had not exhausted Tribal Court remedies concerning the Tribal Court's exercise of civil jurisdiction over API. *API v. Sac & Fox Tribe of the Miss. in Iowa*, 401 F.Supp.2d 952, 958 (N.D. Iowa 2005) (Reade, C.J.). In doing so, the court recognized that "the examination of tribal sovereignty and jurisdiction should be conducted in the

first instance by the tribal court itself[.]" *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294, 1299 (8th Cir. 1994); *see also LaPlante*, 480 U.S. at 16 (applying exhaustion rule to diversity cases and holding a federal court should "stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction" (internal quotation marks omitted)).

As discussed above, the parties have exhausted Tribal Court remedies on the civil jurisdiction issue. The Tribal Court found that its exercise of civil jurisdiction over API was proper. The Tribal Court of Appeals affirmed that decision. Because the civil jurisdiction question has been fully exhausted in the Tribal Court system, sovereign immunity does not bar the court's consideration of this issue.

In conclusion, the court finds that sovereign immunity does not bar Count I.

2. Count II: breach of contract

Next, the court turns to consider whether sovereign immunity bars Count II, API's breach of contract claim. API argues the Walker Council waived the Tribe's sovereign immunity as to Count II when the Walker Council entered into the Agreement containing the arbitration clause on behalf of the Tribe. Absent waiver by a tribe or action by Congress, "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 760, 118 S. Ct. 1700, 140 L.Ed.2d 981 (1998). A tribe's consent to arbitration may operate as a waiver of its sovereign immunity. *C & L Enters.*, 532 U.S. at 423.

The validity of the Agreement turns on whether the Walker Council was the governing body of the Tribe at the time the Agreement was executed. As the court previously noted, the question over the Tribe's true governing body is an intra-tribal dispute and not subject to the court's jurisdiction. *API*, 401 F.Supp.2d at 961 (citing *Longie v. Spirit Lake Tribe*, 400 F.3d 586, 589 (8th Cir .2005) (explaining that federal courts should refrain from exercising jurisdiction pursuant to 28 U.S.C. § 1331 when the case involves an intra-tribal dispute)); *In re Sac & Fox Tribe*, 340 F.3d at 766 (affirming this court's decision that it lacked subject matter jurisdiction to resolve an intra-tribal leadership dispute).

The Tribal Court determined the Walker Council was not the governing body at the time the Agreement was executed and that the Agreement was therefore not binding. Accordingly, the court defers to the Tribal Court's finding that the Agreement is not valid and finds any waiver of sovereign immunity in the Agreement to be ultra vires. *See Prescott v. Little Six, Inc.*, 387 F.3d 753, 756-57 (8th Cir. 2004) ("[W]e defer to the tribal courts' interpretation of tribal law.").

API argues the Tribal Court's determination that the Agreement is invalid has no bearing on the Walker Council's ability to waive the Tribe's sovereign immunity. The court disagrees. The Eighth Circuit Court of Appeals has held a challenge to the validity of a contract with a tribe "calls into question all provisions contained therein (including provisions relating to arbitration, sovereign immunity, and federal district court jurisdiction)." *Bruce H. Lien Co.*, 93 F.3d at 1417. If the Walker Council was not authorized to enter into the Agreement, then it follows

that it was not authorized to waive the Tribe's sovereign immunity pursuant to the arbitration clause contained in the Agreement. *Id.*; *see also* 42 C.J.S. Indians § 22 (Online ed. 2008) ("A tribal official cannot waive the tribe's immunity unless authorized to do so by tribal law."). The Tribal Court held the Walker Council was not the Tribe's governing body at the time the Walker Council purported to enter into the Agreement and waive the Tribe's sovereign immunity through the arbitration clause. API presents no other evidence that the Tribe waived its sovereign immunity. Accordingly, the court finds the Tribe did not waive its sovereign immunity to be sued for breach of the Agreement in this court. As a result, the Tribe's sovereign immunity bars API from bringing its breach of contract claim in this court.[5]

This holding is limited in scope to Count II, the breach of contract claim. As set forth above, sovereign immunity does not bar the court from considering Count I, the request for a declaratory judgment concerning the Tribal Court's exercise of civil jurisdiction over API.[6]

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[5] Because sovereign immunity bars the court's consideration of API's breach of contract claim, it need not address the Tribe's alternative argument that API's breach of contract claim fails to state a claim upon which relief can be granted.

[6] API argues a provision in the Code of Federal Regulations, 25 C.F.R. § 83.2 (2009), supports its argument that the Tribe waived its sovereign immunity in the Agreement. Section 83.2 states that when the BIA acknowledges a tribe's existence, the recognized tribe "is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 25 C.F.R. § 83.2. API in-

(footnote continued on next page)

In the court's view, API misapprehends the purpose of § 83.2, which is "to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes." *See* 25 C.F.R. § 83.2. This regulation does not give an invalid tribal council the power to waive a tribe's sovereign immunity simply because it is recognized as a tribe's governing body by the BIA. Moreover, as with other sovereign nations, sovereign immunity inheres to a tribe as a nation-not to a coalition of tribe members purporting to act as a tribe's governing authority. *See Ninigret Dev.*, 207 F.3d at 29 (noting a tribe's "sovereign immunity predates the birth of the Republic" and "rests on the status of Indian tribes as autonomous political entities, retaining their original natural rights with regard to self-governance") (internal quotation marks omitted).

E. Tribal Court's Jurisdiction Over API

Next, the court turns to consider whether the Tribal Court may exercise civil jurisdiction over API with respect to the Tribe's tort claims in light of the fact that API is a non-Indian third party. Generally, a tribe may not exercise civil jurisdiction over non-Indian third parties. *See Montana v. United States*, 450 U.S. 544, 565, 101 S. Ct. 1245, 67 L.Ed.2d 493 (1981). There are two exceptions to this general rule. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmem-

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sists the BIA's acknowledgment that the Walker Council was the Tribe's governing council at the time the Agreement was executed "vested the Walker Council with power over the Tribe's federal sovereign immunity." Brief in Support of Motion for Summary Judgment (docket no. 63), at 19. API cites no authority for this interpretation of § 83.2.

bers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Second, a tribe has civil jurisdiction over non-Indians when a non-Indian engages in conduct on tribal land that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at 566. "These exceptions are limited ones, and cannot be construed in a manner that would swallow the rule or severely shrink it[.]" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, --- U.S. ----, ----, 128 S. Ct. 2709, 2720, 171 L.Ed.2d 457 (2008) (internal citations and quotation marks omitted). A tribal court must first examine whether it has civil jurisdiction over a non-Indian, and, after the tribal court completes its examination, a district court has federal question jurisdiction to review whether a tribal court has exceeded the lawful limits of its jurisdiction. *Nat'l Farmers*, 471 U.S. at 856.[7]

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[7] The Tribal Court of Appeals drew an unusual distinction between tortious nonmember conduct on fee land and tortious nonmember conduct on trust land; namely, that *Montana* applies only to tribal fee lands, not tribal trust lands. The Tribal Court of Appeals concluded that, because the Casino is on trust land rather than fee land, *Montana* should not apply, and, consequently, the "Tribe retain[ed] presumptive civil jurisdiction" over API. Tribal Court of Appeals Order at 16 (emphasis in original). API challenges this conclusion. After concluding *Montana* did not apply, however, the Tribal Court of Appeals applied the traditional *Montana* analysis and concluded in the alternative that, even if *Montana* applied, the Tribal Court had jurisdiction over API under *Montana*. As set forth below, the court agrees with the Tribal Court of Appeals's alternate conclusion. Accordingly, the court need not consider whether *Mon-*

(footnote continued on next page)

1. Protective prong

The Tribe (Bear) argues the Tribal Court has civil jurisdiction over API under the protective prong of the *Montana* exception: "A tribe may [...] retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. "The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." Plains Commerce, 128 S. Ct. at 2727 (quoting *Montana*, 450 U.S. at 566). "'[T]he elevated threshold for application of [this] *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.'" *Id.* (quoting F. Cohen, Handbook of Federal Indian Law § 4.02[3][c] at 232, n. 220 (2005 ed.)). Federal courts recognize that "it can be argued that torts committed by or against Indians on Indian land always threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Philip Morris USA, Inc. v. King Mtn. Tobacco Co., Inc.*, 552 F.3d 1098, 1109 (9th Cir. 2009) (internal quotation marks omitted). Accordingly, a federal district court should bear in mind that the "generalized threat that torts by or against its members pose for any society[ ] is not what the [protective] *Montana* exception is intended to capture." *Id.* (citing *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 657 n. 12, 121 S. Ct. 1825, 149 L.Ed.2d 889 (2001) ("*Montana* 's second exception can be misperceived. The

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tana applies to Tribal land held in trust because the Tribal Court's civil jurisdiction over API is proper in any event.

exception is only triggered by *nonmember* conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered necessary to self-government.") (emphasis in original)). Instead, *Montana* 's protective exception "envisions situations where the conduct of the nonmember poses a direct threat to tribal sovereignty." *Id.* (citing *Atkinson*, 532 U.S. at 657 n. 12).

The court agrees with the Tribe's assessment that "[a] case more suitable for application of the 'protective' prong can scarcely be imagined." *See* Tribe's Resistance Brief (docket no. 86-3), at 17. API's conduct had a "direct effect" on both the political integrity and the economic security of the Tribe. *Montana*, 450 U.S. at 566. And, API's conduct did more than injure the Tribe-it "imperil[ed]" its subsistence. *Plains Commerce*, 128 S. Ct. 2727. The court examines API's impact on the Tribe's political integrity and economic security, in turn.

i. Political integrity

API's conduct imperiled the Tribe's political integrity. In essence, API invaded the Tribe's land to quell an intra-tribal governmental dispute. API argues this intra-tribal dispute was merely incidental to the raid. API contends that, if the court finds the raid imperiled the Tribe's political integrity, any action taken by a non-member on tribal land during an intra-tribal governmental dispute would justify a court's invocation of the second *Montana* exception. The court disagrees. API's actions were made and intended to be a direct challenge to the Bear Council. API raided the Casino on behalf of the Walker Council, which was not the Tribe's true governing authority. API conducted the raid pursuant to the Agree-

ment, and the Agreement's terms indicate the services API was expected to provide related directly to the Tribe's governmental affairs. *See* Agreement at ¶ I.2.A (stating API "shall perform services directly relating to the investigation of a takeover by dissidents at the [Casino] located on the Tribe's reservation lands" and "[i]nvestigat[e] [...] individuals involved in the unlawful acts against the Tribal Government"). In other words, API was hired to assist in the resolution of an intra-tribal governmental dispute, which strikes at the heart of the second *Montana* exception. The fact API believed it was operating with the consent of the Tribe's governing authority, that is, the ousted Walker Council, has no effect on the application of this exception. In truth and in fact, API raided the Casino specifically to weaken one side of an intra-tribal governmental dispute, which happened to be the Bear Council, the Tribe's true governing body. This is an act with potentially catastrophic consequences to the Tribe's government. The court concludes this merits the application of the protective prong of the *Montana* exception and that the Tribal Court's exercise of civil jurisdiction over API was proper.

ii. Economic security

API's conduct also imperiled the Tribe's economic security. The center of API's activity was the raid of the Casino, which is the Tribe's economic hub. As the Tribal Court of Appeals noted, the Casino "is the Tribe's economic engine, and is where some of the Tribe's most sensitive documents are kept. It was precisely these things over which API sought control, on behalf of the Walker Council." Tribal Appeals Court Order at 16. The Tribe's economic viability turns on the Casino's operations, and API sought to

wrest control of the Casino out of the hands of the Tribe's true governing body, the Bear Council, and into the hands of the Walker Council. The fact API believed it was operating pursuant to the Tribe's authority does not change the fact that API forcefully and intentionally compromised the Tribe's economic center. The court finds API's raid of the Casino had potentially catastrophic consequences to the Tribe's continuing economic security.

API argues the Casino was not operating at the time the raid occurred, thereby diminishing the economic instability the raid created. Even so, the raid of the Casino had potentially catastrophic consequences to the Tribe. API sought to transfer control of the Casino to Tribe members who were without authority to manage and operate the Casino. API also misappropriated Casino trade secrets. These and other acts had a potentially devastating impact on the continuing viability of the Casino, whether or not it was operating at the time of the raid.

iii. Cases applying protective prong

The cases in which courts have applied the second *Montana* exception are aligned with the instant action.

In *Babbitt Ford, Inc. v. Navajo Indian Tribe*, the Ninth Circuit Court of Appeals held the protective prong of *Montana*'s jurisdictional exception applied to an automobile company's repossession of a vehicle on tribal land. 710 F.2d 587, 593 (9th Cir. 1983). The *Babbitt* court reasoned this conduct had a direct effect on the tribe's health and welfare because "[r]epossession of an automobile has the potential to leave a trib[e] member stranded miles from his or her nearest neighbor" and "repossession without the

consent of the tribe member also may escalate into violence, particularly if others join the affray." *Id.*

In *Fry v. Colville Tribal Court of the Confederated Tribes of the Colville Reservation*, a district court applied the second *Montana* exception due to a stipulated judgment designating jurisdiction in the tribal court because "the nonmember defendant put the political integrity of the tribe and the tribal court at issue in any failure to abide by the terms of the judgment." No. CV-07-0178-EFS, 2007 WL 2405002, *3 (E.D. Wash. Aug.17, 2007). The judgment at issue provided for the disposition of a significant amount of real and personal property within tribal boundaries. *Id.*

In *Elliot v. White Mountain Apache Tribal Court*, a district court held the second *Montana* exception likely applied because a non-member's conduct caused a fire that burnt a great deal of timber on the tribe's land. No. CIV 05-4240-PCT-MHM, 2006 WL 3533147, *5 (D. Ariz. Dec.6, 2006). The court held this impacted the tribe's ability to use its own land. *Id.* The court reasoned the non-member's conduct "threaten[ed] the economic security of the tribe based upon the interference of the use of the tribe's land and timber and the overall welfare of the tribe as such resources are material to the tribe's stability." *Id.*

In *Cheromiah v. United States*, a district court applied the second *Montana* exception in a case involving a medical malpractice claim against a medical services provider. 55 F. Supp. 2d 1295, 1305 (D.N.M.1999). The hospital "provide[d] the only western medical care most [...] Tribe members receive[d]." *Id.* The court held "[m]alpractice by the major medical provider to the Tribe has a significant

impact on 'the right of reservation Indians to make their own laws and be ruled by them' as it may jeopardize their very ability to survive as a people." *Id.* (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 458, 117 S. Ct. 1404, 137 L.Ed.2d 661 (1997)).

In summary, the court finds that the second *Montana* exception applies and that the Tribal Court's exercise of civil jurisdiction over API was proper.

2. Consent prong

The Tribe also argues the Tribal Court has civil jurisdiction over API under the consent prong of the *Montana* analysis. Because the court has already found the Tribal Court's exercise of civil jurisdiction over API was proper under the protective prong of the *Montana* exceptions, the court need not address this issue. The court notes, however, that both the Tribal Court and Tribal Court of Appeals declined to apply this *Montana* exception. This court would do the same. *See, e.g.*, *Montana*, 450 U.S. at 565 ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

3. Miscellaneous arguments

API argues that two other factors bar the Tribal Court from exercising civil jurisdiction over API: (1) 25 C.F.R. § 83.2 and (2) the arbitration clause. The court addresses these arguments, in turn.

i. Section 83.2

API argues that the question of whether the Walker Council had authority to enter into the Agreement and choose arbitration for dispute resolu-

tion is a matter of federal law, not tribal law. API claims the question of who "the 'true' governing council of a tribe *for tribal issues* is simply irrelevant to the *federal issue* of who can waive the tribe's sovereign immunity and agree to resolve disputes in a non-tribal forum." API Summary Judgment Motion Br. at 17 (emphases in original). In support of this argument, API cites 25 C.F.R. § 83.2, the regulation discussed above that gives rise to federal recognition of Indian tribes. API contends that, because the BIA and NIGC recognized the Walker Council as the governing body of the Tribe under § 83.2, this recognition attributed federal powers to the Walker Council, including the federal power to waive sovereign immunity through an arbitration clause.

For the same reasons discussed above, the court finds § 83.2 is inapplicable. As the Tribal Court of Appeals held, "[t]he BIA recognition process exists for the benefit of the federal-tribal relationship, not to give disappointed third parties an authority higher than the tribe as to tribal law." Tribal Court of Appeals Order at 9. The Tribal Court found the Walker Council was without authority to enter into the Agreement. The Walker Council was therefore without the authority to bind the Tribe to the arbitration clause in the Agreement. The court will not apply § 83.2 to void the Tribal Court's finding on the Tribe's intra-tribal governmental dispute or its effect on the Agreement.

API argues that, if the court does not interpret and apply § 83.2 in the manner it suggests, "[a]ny private business doing business with a tribe during an intra-tribal leadership dispute would run the risk of its [a]greement being voided by subsequent events beyond its control when a new tribal council came

into power." API Summary Judgment Br. at 22. The court recognizes this risk; however, this is a risk API chose to take. As the Tribal Court of Appeals noted, a "chilling effect" on a nonmember's negotiation with a tribe may be "inevitable" given the possibility of intra-tribal disputes. Tribal Court of Appeals Order at 10. However, "businesses that choose to work with an affirmatively *ousted* tribal council are taking a substantial risk. They ought not be heard [to] complain when the gamble fails." *Id.* (emphasis in original). The court concludes the unique set of facts giving rise to the Tribal Court's civil jurisdiction is unusual and appropriate for *Montana*'s rarely applied protective exception.

ii. Arbitration clause

API's argument that the arbitration clause in the Agreement bars the Tribal Court from exercising civil jurisdiction is a non-starter. As the court noted in its earlier decision:

> Before the arbitration clause in the Agreement can be enforced, a court must determine whether the Agreement is valid. If [the Walker Council] had authority to enter into the Agreement and it was validly formed, then, the court agrees that the arbitration clause should be enforced. If, however, on the other hand, [the Walker Council] was without authority to enter into the Agreement on behalf of the Tribe and the Agreement is found to be an invalid and unenforceable contract, the provisions of the contract, including the arbitration clause, cannot be enforced.

Attorney's Process, 401 F. Supp. 2d at 961. The Tribal Court found the Agreement is void. The arbitration clause contained in the Agreement is there-

fore unenforceable. *Id.; see also Bruce H. Lien Co.*, 93 F.3d 1417 (noting a challenge to the validity of a contract with a tribe also challenges the validity of an arbitration agreement in the contract). The arbitration clause cannot operate to bar the Tribal Court from exercising civil jurisdiction over API because the Bear Council never agreed to it.

In summary, the court concludes the Tribal Court's exercise of civil jurisdiction over API is proper.

V. CONCLUSION

In light of the foregoing, **IT IS ORDERED THAT:**

(1) The Motion to Dismiss (docket no. 48) is **GRANTED;**

(2) The Summary Judgment Motion (docket no. 63) is **DENIED;** and

(3) The Complaint (docket no. 2) is **DISMISSED.** The Clerk of Court is **DIRECTED** to close this case.

IT IS SO ORDERED.

APPELLATE COURT OF THE
SAC & FOX TRIBE OF THE MISSISSIPPI IN
IOWA

Sac and Fox Tribe of the Mississippi in Iowa,
Plaintiff,

v.

Attorney's Process and Investigation Services, Inc.

Defendant.

Case No. API-CV-APP-2008-02-124

MEMORANDUM AND ORDER

I. Background

This appeal arises from a dispute regarding the validity of a contract drat the embattled former Sac & Fox Tribe of the Mississippi in Iowa's (the "Tribe's") Tribal Council, the "Walker Council," allegedly entered on behalf of the Tribe with a non-member security services company, Defendant Attorney's Process and Investigation Service, Inc. ("API"). The Tribe filed a complaint in Tribal Court, making a variety of tort claims against API, basing its argument in part on the fact that the contract was invalid because the Walker Council bad no authority to enter it. The Tribe argued that by the time the Walker Council purported to enter the contract, the tribal membership had ousted the Walker Council, and API was aware of the ouster. The Tribe therefore made various tort claims and sought reimbursement for all money paid under the contract. API moved to dismiss, mainly arguing that the Tribal Court lacked subject matter jurisdiction over

it, and that the contract was valid, requiring arbitration of any disputes. On March 26, 2008, the Tribal Court held that it had subject matter jurisdiction over API and that the contract was, indeed, invalid, and API appealed (the "Tribal Court Order"). The material facts and procedural posture are as follows.

A. Walker Council's refusal in act on recall petitions.

As of September 2002, the popularly-elected, seven-member Tribal Council included Alexander Walker, Jr., Frank Wallace, Jr., Aaron Walker, Lyle Walker, Vern Jefferson, Talbert Davenport, Sr., and Calvin Johnson, Sr. *See* Tribal Court Order at 3 ¶ 2. On September 26, 2002, the Walker Council received recall petitions for all seven members, which complied with constitutional requirements for validity, in that they contained signatures of more than thirty percent of eligible voters. *Id.* at 3 ¶¶ 1-2, *citing* Art. XII § 1 of the Const. and Bylaws of the Tribe ("Tribal Coast.") (authorizing recall petitions). The petitions stated on their face that they were based on "the right as provided by Article XII, Section 1, of the Constitution and By Laws." Tribe's App'x at Tab I (recall petitions for all seven members). On October 10, 2002, the Walker Council ostensibly accepted the petitions, but never acted on them and failed to set recall elections. *See* Tribal Court Order at 3 ¶ 3, 4¶¶ 3-4. Almost five months later, on March 4, 2003, the Walker Council rejected the petitions, which it had no authority to do.[1] *Id.* at 3 ¶ 4, 4 ¶ 4.

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[1] While the Walker Council later claimed that there were defects in two of the petition signatures, it did not make this assertion until May 2003. *See* Tribal Court Order at 9 ¶ 18, 10

(footnote continued on next page)

B. Response of Hereditary Chief Old Bear and Tribal membership.

Also on March 4, the Hereditary Chief Charles Old Bear took action to appoint an entirely different interim Tribal Council, including Homer Bear, Jr., Wayne Pushetonequa, Harvey Davenport, Jr., Ray Young Bear, Keith Davenport, Deron Ward, and Frank Blackcloud (known as the "Bear Council")[2] *Id.* at 4 ¶ 5. On March 26, 2003, at a General Meeting of the Tribal membership, Hereditary Chief Old Bear administered the required oaths of office. *Id.* at 4 ¶ 7, 5 ¶ 7; *see also* API App'x at Tab 6, Ex. U-10 (Tribal Council Mtg. Minutes, 3/26/03).

On April 14, 2003, at another General Meeting, a majority of the eligible voters signed a declaration of support for Hereditary Chief Old Bear's actions. *See* Tribal Court Order at 5 ¶ 8; *see also* Tribe's App'x at Tab 6 (Tribal members' declaration of support); API App'x at Tab 6, U-15-17 (Gen'l) Mtg. Minutes, 4/14/03). At the top of the sheets was language detailing the purpose of the meeting as follows:

¶¶ 18-19. Given the *de minimus* nature of this defense, the Tribal Court gave it no weight and this finding did not affect its conclusions of law. *Id.* We agree with that assessment.

[2] While the Tribal Court made no findings of fact based upon a March 8, 2003 letter Chief Bear wrote to "Meskwaki Tribal Members," the letter is part of the record and memorializes the Walker Council's refusal to act on the petitions, the Bureau of Indian Affairs's ("BIA's") deferral to the Tribe to resolve the leadership dispute internally, the unavailability of a Tribal Court at that time to address the dispute, and Hereditary Chief Old Bear's actions after reviewing "the Tribe's traditional ways." *See* Tribe's App'x at Tab 5. It also appears to bear the signatures of the members of the new Bear Council. *Id.*

> To determine if all members of the Tribal Council must be recognized as persons of honor, law abiding, and of good character. The voting members of the Tribe shall be the sole judge of these qualifications.
>
> The [Tribal] Constitution requires in ARTICLE IV, *Sec. 2* that all members of the Tribal Council *must* be recognized as such. We the undersigned voting members of the Tribe have attempted to use other provisions of our Constitution to officially make these decisions about the qualifications of the elected Tribal Council. We have been disallowed by the elected Tribal Council the use of the constitutional recall procedure.
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> Because the elected Tribal Council has denied the use of the Constitution to the members of the Tribe, we the voting members of the Tribe, are compelled to carry out our constitutional duty to determine if all members of the elected Tribal Council can be recognized as persons of honor, law abiding, and of good character.

Tribe's App'x at Tab 6. The sheets went on to state that where a Tribal Council member was not "a person of honor, law abiding, and of good character, his position shall terminate immediately upon the final vote tally." *Id.* The voters who signed this declaration represented a majority of the eligible voters, "overwhelmingly" determining that none of the

seven members of the Walker Council met this standard. *See* Tribal Court Order at 5 ¶ 8.

On May 22, 2003, the Tribe also conducted a special election to fill the seven Tribal Council Member positions, and all seven members of the Bear Council were elected, again by overwhelming majorities. *Id.* at 5 ¶ 9, 6 ¶ 9. And although the Tribal Court did not make findings on this point, the record appears to show that the Tribe thereafter held an election in the fall of 2003, and the Bear Council was again confirmed in its entirety. *See, e.g.*, Tribe's Suppl. Hrg. Br. at 2 (8/25/06) (noting Bureau of Indian Affairs ("BIA") recognized results of fail 2003 election).

C. Walker Council's refusal to step down, entry of API Contract, and API's alleged torts.

At no time before the fall 2003 elections did the Walker Council stop purporting to conduct business on behalf of the Tribe. It continued to hold itself out as the official Tribal Council. On June 16, 2003, after most of the events described above had occurred and there were significant questions as to whether the Walker council had any legitimate authority, the Walker Council purported to enter into a contract on behalf of the Tribe with API (the "Contract"). *See* Tribal Court Order at 6 ¶ 11. The purpose of the API Contract was to "determine whether tribal funds have been misappropriated by those individuals who have illegally seized control of tribal buildings and assets," and API was to "investigate the possible conversion of tribal funds and any related illegal activity against the Tribe." *Id.* at 6 ¶ 10; *see also* API App'x at Tab 6, Ex. B (API Contract, 6/16/03). The Contract contained an arbitration clause that required any dispute under the Contract to be submit-

ted to arbitration in lieu of Tribal Court or other court, and that any arbitration award would be enforced in Iowa state or federal court. *See* Tribal Court Order at 6 ¶ 13, 7 ¶ 13, 8 ¶ 13.

Between June 30, 2003 and September 30, 2003, the Tribal Court found (and API did not dispute) that $1,022,171.26 was transferred from the Tribe to API. *Id.* at 6 ¶ 12. The Court's basis for this number was the affidavit of the Comptroller of the Tribe, Ram K. Dhanwada. *Id.* This figure represents more than $11,000 per day for this period of time. The affidavit further included Mr. Dhanwada's claim that the transfer "was not authorized by the Tribe."[3] *Id.* Despite the Tribe's demand that API return the money, claiming it was never authorized by the actual Tribal Council, the Bear Council, it has never been returned. The Tribe claimed that "the former tribal leaders who contracted with API [the Walker Council] were without authority to bind the Tribe, and that API was sufficiently on notice of the leadership dispute existing and prior to and at the time the Contract was executed, to have actual knowledge that the former tribal leaders were without authority to bind the Tribe." Tribal Court Order at 1. This formed the basis of the Tribe's conversion claim against API. *Id.*

Moreover, the Tribe alleged in its Complaint that API committed various other torts against the Tribe, largely associated with events of October 1, 2003. *See* Tribal Comp. at 2-6. The Tribe claimed on that

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[3] Both parties earlier had stipulated this statement of opinion be stricken from the affidavit. *See* API ate API App'x at Tab 4 (Hrg. T. (7/27/06) at 8 Ins. 13-25, 9 Ins. 1-16).

date that API trespassed in the Tribe's Community Center and Casino, which is on trust land within the Tribe's reservation (the "Settlement," in and around Tama, Iowa), and seized Tribal property. *Id.* The Tribe claimed that API "broke in" with "approximately 30 enforcers," some of whom "were armed with batons and one or more was armed with a firearm," and who "committed unlawful assaults and batteries and false imprisonments against tribal members and employees," amongst other allegations. *Id.* at 5 ¶ 32. While there, the Tribe also claimed API intentionally damaged and destroyed Tribal property. *Id.* at 2 ¶¶ 7-10.

The Tribe further alleged that API "obtained and exercised control over all or nearly all tribal gaming information and tribal gaming commission information, including but not limited to detailed compiled tribal gaming financial information, information regarding the extent and scope of tribal security and surveillance coverage, information regarding ongoing gaming commission investigations, all personnel files, all legal files, and devices used to insure the integrity of the Casino's operation...." *Id.* at 2 ¶ 11, 3 ¶ 11. This confidential property contained detailed, sensitive information regarding every aspect of the gaming operation to which access was restricted, was stored in secured areas, was subject to various tribal gaming laws and regulations, included valuable trade secrets, was protected from disclosure by confidentiality agreements and policies, and which would damage the Tribe if disclosed. *Id.* at 3 ¶¶ 13-16, 4 ¶¶ 17-19. The Tribe alleged that API received access to it "only by criminally breaking into and entering the secured areas of the Casino and by the threat to use armed force and by the use of other force." *Id.* at 3 ¶ 15. The Tribe claimed it suffered

property damages, and that it would suffer other serious damages through any disclosure of this information. *See, e.g.*, 2 ¶ 10, 4 ¶19.

D. Federal agency position that Walker Council retained leadership until at least until fall 2003 elections.

Before and after the Bear Council was installed in the spring of 2003, Hereditary Chief Old Bear and others communicated with various federal agencies regarding the new Bear Council. *See, e.g.*, Tribal Court Order at 8 ¶¶ 13-14, 9 ¶¶ 14, 16-17. But these agencies refused to recognize the Bear Council for purposes of gaming activities and other federal government matters until the fall 2003 elections. *Id.* at 8 ¶13 (noting on April 30, 2003 that the National Indian Gaming Commission ("NIGC") sent notice of violation based on continued recognition of Walker Council on); 9 ¶ 14 (March 14, 2003 letter from Midwest Regional Director of the BIA refusing to recognize Bear Council); 9 ¶ 16 (May 23, 2003 letter from Secretary of the Interior in response to request to certify special election stating that it "was not called and held in accordance with tribal law and, therefore, we will not recognize the results of it"); 9 ¶ 17 (August 28, 2003 letter from BIA stating it continued to recognize Walker Council). While the record does not expressly state this, the Secretary of the Interior (and, correspondingly, all other federal agencies) continued to recognize the Walker Council, and apparently refused to recognize the Bear Council, for at

least six months after the Hereditary Chief took action.[4]

E. Tribal Court case.

In August 2005, the Tribe filed a complaint seeking damages from API relating to its tort claims, including for conversion of Tribal funds and the October 1, 2003 trespass and misappropriation of trade secrets. *See* Tribal Court Order at 1.

In September 2005, API moved to dismiss under Tribal Court Rule C-7(b) (and later submitted an "Application to Conduct Limited Discovery" under Rule C-15). This was based in part on its argument that the Tribal Court's lacked subject matter jurisdiction over API as a nonmember. *Id.* at 2. In the alternative, API argued that the Contract was valid and, therefore, its arbitration clause was binding upon the Tribe, and no Tribal Court remedy was available. *Id.*

The parties conducted limited discovery, as API had requested. *Id.* at 2-3. This included exchange of documents and at least one deposition, and the parties submitted supplemental briefing and appeared at a hearing on July 27, 2006. *See* API's App'x at Tab 4 (Hrg. T., 7/27/06).

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[4] *See, e.g.*, Tribe's Suppl. Hrg. Br. at 2 (8/25/06) (noting BIA recognized results of fall 2003 election). The NIGC ultimately ordered the Tribal Casino closed because it did not view the Bear Council as authorized to operate it. *See* API App'x Tab 6, Ex. D (NIGC Notice of Violation, 4/30/03); *see also In re: Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 753-55 (8th Cir. 2003) (discussing casino closure and NIGC action due to non-federally-recognized Bear Council operating it in place of Walker Council).

On March 23, 2008, the Tribal Court denied API's motion.[5] *See* Tribal Court Order at 12 ¶ 1. It held that it had subject matter jurisdiction under Section 5-4101, and personal jurisdiction over API under Section 5-4102 (2)-(8). Tribal Court Order at 10 ¶ 1. It held that the Walker Council violated its constitutional duty to hold elections once it received the recall petitions. *Id.* at 10-11 ¶ 2, *citing* Tribal Const. Art. XII, § 1. When the Walker Council abrogated its duty, the Tribal members "were justified in approving the exercise of the retained powers of the Hereditary Chief and Clan Representatives to establish a Tribal Council where all members are recognized as persons of honor, law abiding, and of good character." *Id.* at 11 ¶ 3. The Tribal Court also stated that the May 22, 2003 Special Election was "a mandate" on behalf of the Bear Council, and against the Walker Council. *Id.* at 11 ¶ 4. The Tribal Court further held that the BIA's continued recognition of the Walker Council after the Special Election was not determinative of the Walker Council's actual fitness, and that "[t]he voting members of the Tribe shall be the sole judge of these qualifications." *Id.* at 11 ¶ 15. Therefore, the Tribal Court concluded that

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[5] The two-and-a-half-year delay in reaching final decision occurred in part because API, in the fall of 2005, simultaneously filed in federal court in the Northern District of Iowa in an attempt to force arbitration under the API Contract. *See Attorney's Process and Investigation Servs. Inc. v. Sac and Fox Tribe of the Mississippi in Iowa*, 401 F. Supp. 2d 952 (N.D. Iowa 2005). The Northern District of Iowa held that API had to first exhaust remedies in Tribal Court, stayed any further proceedings, and also noted that the Tribe might have sovereign immunity from API's claims. *Id.* at 957-63. Additionally, both parties filed a high volume of briefs in the Tribal Court leading up to the Tribal Court Order.

the Walker Council had no authority to bind the Tribe to the API Contract in June 2003, and the dispute resolution provisions therein did not apply. *Id.* at 11 ¶ 7, 12 ¶ 8. API appealed.[6]

II. Legal Discussion

A. Basis for appeal

While this Court has already granted leave for this interim appeal, we reserved the question of the legal basis for it. *See* Order Granting Appeal and Setting Briefing Schedule (May 28, 2008). The Court hears this matter as a discretionary appeal under Tribal Code Section 5-4401(b)(1), as it deals with an "order not otherwise appealable involving a controlling question of law or substantial difference of opinion, and immediate appeal may materially advance termination of proceeding." The controlling questions of law here involve defining the Tribe's subject matter and personal jurisdiction over non-member companies that conduct themselves on the Settlement. This issue is at the heart of this case, and has repercussions both for the tort claims that remain to be heard by the Tribal Court, as well as for any future case involving the Tribe and a nonmember company. Additionally, we rely on our broad authority to hear the appeal of "any other order not otherwise appealable" under Section 5-4401(b)(2).

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[6] Since the time this appeal was filed, API has also counterclaimed for breach of contract against the Tribe in Tribal Court, seeking additional payments under the Contract. Despite this counterclaim, API has also briefed here its claim that the Tribal Court is "not an adequate forum for the entire controversy" based on the claim that the Tribal Court cannot hear counterclaims against the Tribe. *See* API Br. at 15.

It is not an appeal of right under Section 5-4401(a), as API has urged, because there has been no "prevention of judgment from which appeal might otherwise be taken." *See* API Br. at 7-8, *citing* § 5-401(a)(3). API's primary argument was that it has been deprived of its defense that the Tribe had authorized payment to API because the Tribal Court had unduly relied on a stricken portion of an affidavit the Tribe had offered. *See* API Br. at 8; Tribal Court Order at 6 ¶ 12 (citing Dhanwada Aff.). API argued that "in finding that the Alex Walker Council had no authority to sign the June 16, 2003 Agreement, the trial court has essentially deprived API of its defense that it was acting with authority and further potentially has prevented API from obtaining a judgment in its favor on the merits." API's Br. at 8; 15-16.

This is a misconstruction of appellate procedure, and a misreading of the Tribal Court Order. First, as a matter of law, if a defense has been excluded, a defendant may nevertheless appeal its exclusion at the conclusion of trial—we are empowered to review any and all of the Tribal Court's conclusions of law *de novo*. *See* Tribal R. App. P. A-7. We can then remand for additional proceedings on that defense, if it was improperly excluded. *See* § 5-4403(b) (allowing remand). There is no basis to claim that an interlocutory appeal is necessary here. Second, while the cited portion of the Dhanwada affidavit was, indeed, stricken, the Tribal Court did not rely upon the affidavit to support its ultimate decision that the underlying Contract was invalid. Indeed, the Tribal Court did not even cite the Dhanwada Affidavit for the truth of fact that Tribe didn't authorize payment. The Tribal Court simply recounted some of the stricken content, committing, at most, harmless er-

ror. *See* Tribal Court Order at 6 ¶ 12; *see also* API App'x at Tab 4 (Hrg. T. (7/27/06) at 8 Ins. 13-25, 9 Ins. 1-16). In any case, the Tribal Court's citation to the affidavit in no way affects the proper timing or availability of appeal.

B. Scope of appeal.

In addition to the question of whether this should be heard as an appeal of right under Section 5-4401(a), we distill the arguments API has submitted on appeal to the following four: (a) that the API Contract is binding on the Tribe because the Walker Council had actual authority to sign it in June 2003, requiring binding arbitration to settle any disputes thereunder; (b) that the BIA and other federal agency's recognition of the Walker Council is conclusive; (c) that the Tribal Court lacks subject matter jurisdiction over API as a nonmember for purposes of the Tribe's tort claims under the two grounds for such jurisdiction articulated in Montana v. United States, 450 U.S. 544, (1981); and (d) that even if the Walker Council did not have actual authority to enter the API Contract, it had "apparent authority," and the Contract should therefore be enforceable against the Tribe.[7]

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[7] API has not challenged the Tribal Court's determination that this matter should first properly be submitted to the Tribal Court and that it is subject to the doctrine of tribal court exhaustion, as the Northern District of Iowa also properly held. *See Attorney's Process and Investigation Servs. Inc.*, 401 F. Supp. 2d at 957-63. API has also asserted that the Tribal Court should "defer" to the federal court in order to permit API's main claim and counterclaim both to be heard. But this is not a proper articulation of the underlying issues of tort versus contract law. There is no legal basis for API to claim that it

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The Tribe has countered: (a) that the actions taken by the Hereditary Chief and Tribal membership before June 16, 2003 "lawfully and constitutionally removed from the Walker Council the power to bind the Tribe to contracts; (b) that the BIA's determination that the Walker Council was the official council is not determinative; (c) that the Tribal Court has jurisdiction over API under *Montana*; and (d) that the doctrine of apparent authority cannot apply against the Tribe. *See* Tribes Br. at 18-24.[8]

C. Standard of review.

We review findings of fact for clear error. *See* Tribal R. App. P. A-7 (empowering Tribal Court of Appeals to review Tribal Court's factual findings and conclusions of law); *see also* Fed. R. Civ. P. 52(a)(6) (setting out clear error standard); *United States v. National Association of Real Estate Boards*, 339 US, 485, 495-96 (1950) (citations omitted) (same). We review *de novo* the Tribal Court's legal conclusions, including regarding subject matter and personal jurisdiction and mixed questions of law and fact. *See, e.g., Mallett v. Bowersox*, 160 F.3d 456, 459 (8th Cir. 1998) (citations omitted).

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will "lose" a contract claim if it could not be heard in Tribal Court along with the tort claims. More importantly, API did not assert its counterclaim until *after* this appeal was filed, so any appellate opinion would be purely advisory and the issue is not properly before the appellate court. *See* API's App. Br. at 15.

[8] We need not reach the issue of the Tribe's 2004 vote not to ratify the Contract, which both parties have briefed, for the reasons discussed below. *See, e.g.*, API Br. at 19-21; Tribe's Br. at 24-26.

D. Tribal law and BIA recognition.

The threshold question here is one of Tribal law. Whether or not the API Contract is valid depends upon whether the Walker Council had authority to enter it, which in turn depends upon whether the Tribe, according to its laws, properly removed the Walker Council. It is well-established that such an intratribal dispute is exclusively within the tribe's own purview to decide.[9]

As a general matter, "[c]ivil jurisdiction over tribal-related activities presumptively lies in tribal courts unless a specific treaty provision or federal statute affirmatively limits the jurisdiction." *Sac and Fox Tribe of the Mississippi in Iowa v. Bear*, 258 F. Supp. 2d 938, 942 (N.D. Iowa 2003), *citing Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *see also Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994) (discussing federal limits of tribal jurisdiction over nonmembers under Montana); *Goodface v. Grassrope*, 708 F.2d 335, 338 (8th Cir. 1983) (expressing "doubt" regarding whether there would be federal jurisdiction over purely intratribal leadership dispute); *Shortbull v. Looking Elk*, 677 F.2d 645, 650 (8th Cir. 1982) (actions for relief based on "tribal deprivations of rights" generally must be resolved through tribal forums). If a tribe has not taken affirmative action to

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[9] For federal decisions recognizing this principle, *see Santa Clara Pueblo v, Martinez*, 436 U.S. 49, 55 (1978) (federal courts lack jurisdiction to decide where tribes have "the power of regulating their internal social relations," to make their own "substantive law in internal matters," and to enforce those laws). *See also Kiowa Tribe of Okla. v. Mfg. Technologies*, 523 U.S. 751, 763 (1998) (reaffirming Martinez).

surrender its sovereign control over internal affairs, and if Congress has not exercised its plenary power to reduce such tribal authority, the tribe possesses exclusive and inherent authority over such issues as intratribal leadership disputes. *See Nero v. Cherokee Nation*, 892 F.2d 1457, 1463 (10th Cir. 1989) (no federal jurisdiction over tribal leadership dispute); *Wheeler v. Swimmer*, 835 F.2d 259, 262 (10th Cir. 1987) (same, stating "[t]he right to conduct an election without federal interference is essential to the exercise of the right to self-government."); *Wheeler v. U.S. Dept. of Int.*, 811 F.2d 549, 552 (10th Cir. 1987) (stating "when a tribal forum exists for resolving a tribal election dispute, the Department must respect the tribe's right to self-government and, thus, has no authority to interfere ..."); *Boe v. Ft. Belknap Indian Cmty.*, 642 F.2d 276, 278-80 (9th Cir. 1981) (tribal election disputes raise no federal question).

That the BIA did not recognize the Bear Council does not affect our analysis of Tribal law. The BIA is not entitled to determine which of rival councils is the official tribal council for purpose of *nonfederal*, day-to-day tribal affairs. The Eighth Circuit considered a similar intratribal dispute in *Goodface*, laying out the distinction between BIA recognition of a tribal council, and the intratribal selection of a tribal council. 708 F.2d at 338-39. There, one of two competing tribal councils of the Lower Brule Sioux Tribe (the "1982 council") brought suit in federal district court based upon the BIA's refusal to recognize it instead of the earlier "1980 council" after an interim election. *Id.* at 337. The BIA thereafter declared that the election dispute "was an intratribal matter which must be resolved by the Tribe." *Id.* In the interim, though, it decided not to offer official recognition to *either* council, but to deal with both as neces-

sary to maintain "basic" tribal services. *Id.* Thereafter, the district court, interpreting the tribal constitution and bylaws, determined that the 1982 council was entitled to recognition and entered injunctive relief to that effect. *Id.*

The Eighth Circuit reversed, stating that it was only because the BIA was involved that it had jurisdiction of any part of the dispute. *Id.* at 338. It held that the BIA abused its discretion in refusing to recognize *one* council, creating a gap in services. *Id.* It held "[a]lthough it was necessary to remedy the situation by ordering the BIA to recognize one governing body, the district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute." *Id.* at 339. The Eighth Circuit vacated that portion of the district court's order recognizing the 1982 council, ordered the BIA to recognize the 1982 council as an interim solution only for federal funding purposes, and directed the rival tribal councils to "seek a tribal remedy, for as previously noted, substantial doubt exists that federal courts can intervene under any circumstances to determine the rights of the contestants in a tribal election dispute." *Id.*; *see also Wheeler*, 811 F.2d at 552; *Sac and Fox Tribe of the Mississippi in Iowa*, 258 F. Supp. 2d at 942 (holding no basis for federal court jurisdiction over intratribal leadership dispute); *Tarbell v. U.S. Dept. of Int.*, 307 F. Supp. 2d 409, 422-26 (N.D.N.Y. 2004) (discussing BIA recognition process and tribal leadership dispute);

In discussing *Goodface*, API argues that "[r]ecognition by the BIA legitimizes a particular Council in its commercial dealings," which is true, in some respects. API Br. at 22. But it is *not* the case,

as API then concludes, that the BIA establishes whether nonmembers can conduct business with the Tribe. *Id.* at 23. The federal government owes no duty to private companies that contract with Indian tribes; rather, it owes a broad trust responsibility to federally-recognized Indian tribes. *See, e.g.*, Exec. Order No. 13336, American Indian and Alaska Native Ed., 40 Weekly Comp. Pres. Doc. 713 (Apr. 30, 2004) (confirming the government-to-government relationship and trust responsibility); *see also Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (discussing "ward-guardian" relationship between tribes and U.S. and defining Indian tribes as "domestic dependent nations"); *Worcester v. Georgia*, 31 U.S. 515 (1832) (laying foundations of trust doctrine).

This is the reason for the federal tribal recognition process—to enable the federal government to carry out its trust responsibility to provide services to tribes by defining what constitutes a tribe. *See, e.g.*, H.R. Rep. No. 103-781, 103rd Conf, 2d Sess., 2 (1994) (defining recognition as "a formal political act, [which] permanently establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation,' and imposes on the government a fiduciary trust relationship to the tribe and its members.") (citations omitted). Recognition "imposes upon the Secretary of the Interior specific obligations to provide a panoply of benefits and services to the tribe and its members." *Id.* at 3 (citations omitted). This "unequivocal federal recognition of tribal status is a prerequisite to receiving the services provided by the Department of the Interior's Bureau of Indian Affairs (BIA), and establishes tribal status for all *federal* purposes." *Id.* (emphasis added). In sum, while federal recognition typically provides some certainty

for a private business in determining whether to contract with an Indian tribe, it is not an insurance policy. The BIA recognition process exists for the benefit of the federal-tribal relationship, not to give disappointed third parties an authority higher than the tribe as to tribal law.

The potential for chaos because of a tribal leadership dispute is plain. The Tribe suffered serious financial losses during this time, including the loss of the majority of its operating expenses due to the closure of its casino, which arose from the complications of this leadership conflict and the lack of federal recognition for the Bear Council. This type of damage is lasting and it is difficult to mend all relationships that suffer during such times. A chilling effect on those willing to contract with the Tribe may be inevitable, even if such an event is rare. Nevertheless, businesses that choose to work with an affirmatively *ousted* tribal council are taking a substantial risk. They ought not be heard to complain when the gamble fails. Neither a private security company utilizing force, nor the BIA, can prop up a tribal government that may have lost its legitimacy to govern. That legitimacy question is a tribal one. BIA recognition does not "select" the tribal council, and is not conclusive for purposes of private dealings with a Tribe. Indeed, API has not even asserted that it relied on the BIA's recognition in deciding to work with the Walker Council. The BIA's failure to extend federal recognition to the Bear Council has no bearing on our analysis of the underlying dispute.

E. Application of Tribal law.

We uphold the Tribal Court's determination that the Walker Council violated Article XII Section I of the Tribal Constitution in refusing to hold recall

elections upon receipt and acceptance of recall petitions. The Tribal Constitution plainly required the Walker Council to act upon the petitions, and the Walker Council did not. We also uphold the Tribal Court's ruling that Hereditary Chief Old Bear and the Tribal membership were entitled to take all the actions they did thereafter in order to remove the Walker Council and install the Bear Council.

As a threshold matter, we feel that this is close to a political question, which would remove from us the power to second guess another "branch" of Tribal government. It is an inherent, sovereign right of a tribe to determine how it will choose its leaders: "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Martinez* 436 U.S. at 55, *citing Worcester*, 31 U.S. at 559. Even the adoption of a tribal constitution does not have the effect of diminishing a tribe's Inherent sovereign powers (although it limits the tribe's institutional structure while it is in effect). *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n. 14 (1982) ("[N]either the Tribe's Constitution nor the Federal Constitution is the font of any sovereign power of the Indian tribes.") Therefore, it is somewhat presumptuous for a tribal court, five years after the fact and before the court was even formed, to determine whether a tribe has validly elected its past leaders. Even if we determined that the Tribe did so improperly at the time, it would be moot—there has, in the meantime, been a federally-recognized election. The only purpose for our evaluation at this time is in order to resolve this dispute.

It is true that the Tribal Court is now the adjudicative body of the Tribe, with the power to uphold

and interpret the Tribe's Constitution. *See, e.g.*, § 5-2102 ("Except as otherwise provided by the laws of the Tribe, the Tribal Court shall exercise all judicial and dispute resolution powers of the Tribe, subject only to the limitations provided in the laws of the Tribe."); *see also* §§ 5-4101 (defining broad Tribal Court subject matter jurisdiction), 5-4302 (defining applicable law for Tribal Court to apply). But at the time this dispute arose, there was no arguable interpreter of any Tribal law besides the Tribal Council, the Tribal membership, or the Hereditary Chief (and Clan Leaders). Given the patently unconstitutional behavior of the Walker Council in rejecting the recall petitions, it is not for us to say that the Tribal membership and Hereditary Chief Old Bear acted improperly in deciding to strip the Walker Council of authority and appoint a new council on April 14, 2003. *See* Tribal Court Order at 11 && 3-4. The Tribal Court appropriately held that the public vote, and majority support, for this action on May 22, 2003 was sufficient to make the Bear Council the official Tribal Council. *Id.*

Furthermore, we also find sufficient legal support in Tribal law for the actions of the Hereditary Chief and the Tribal membership. The combination of retained traditional powers and the Tribal membership's reasonable exercise of its constitutional ability to determine fitness were sufficient to remove the Walker Council and seat the Bear Council in its place.

a. Retained powers of Hereditary Chief.

First, the question is whether the Hereditary Chief retained the power to remove the Walker Council and appoint the Bear Council. API argues

that the 1937 Constitution stripped the Hereditary Chief of the ability to take such actions, and that to "vest" the Hereditary Chief with the power to appoint a Tribal Council would require actual amendment to the Constitution itself. *See* API Br. at 18-19, *citing* Art. X, Section 4 (stating "[a]ny rights and powers heretofore vested in the [Tribe] but not expressly referred to in this Constitution, shall not be abridged by this article, but may be exercised by the people of the Tribe, through the adoption of appropriate by-laws and constitutional amendments"). API also argues that the Tribe's actions were a contradiction of "clear provisions" of the Tribal Constitution regarding elections. It urges us to look to Cheyenne-Arapaho precedent that requires that tribal "customs (and their perimeters) be both documented and subjected to the normal roles of the adversary system...." API Br. at 19, *citing Hoffman v. Cheyenne-Arapaho Election Bd.*, 7 Okla. Trib. 126, 2000 WL 33976522 (Cheyenne Arapaho 2000).

One of the cornerstones of Sac & Fox Tribal law remains traditional Tribal practices, and there is no requirement that they be written down. Section 5-4302(a) provides that the Tribal Court shall follow the common law, including the customs and traditions, of the Tribe. And although the Tribal Court did not cite it as the basis for decision, Section 1-2101(a) of the Tribal Code provides:

> Except as superseded by the Constitution and By-laws of the Tribe or this Code, the custom and traditions of the Tribe are hereby declared to be the common law of the Tribe and shall be the law applicable within the Settlement and shall be the rule of decision in

> all agencies, departments, commissions, and tribunals of the Tribe.

Moreover, "the common law of the Tribe shall supplement this Code and this Code shall be interpreted whenever possible as supplementing and not displacing the common law of the Tribe." § 1-2101(c). According to the Code, Section 1-2101 was adopted by Tribal Council Resolution on February 22, 2002, more than a year before the Hereditary Chief's actions. Contrary to API's assertions, the Tribe *has* passed "appropriate by-laws" to incorporate any and all traditional Tribal law, to the extent that it needed to in order to comply with the Tribal Constitution.

Additionally, since it was formed in 2005, the Tribal Court has been authorized to determine, memorialize, and then apply traditional Tribal law in its decisions. For example, while the Tribal Court has the option of determining Tribal custom through a community panel authorized as in Section 5-2501, it is not mandatory.

The record in this case does not include much detail regarding the specific basis in Tribal tradition for Hereditary Chief Old Bear's actions to strip the Walker Council of authority and appoint a new one. But the Tribal Court determined that the Hereditary Chief did, indeed, retain this power. The Tribal Court held that the actions of the Hereditary Chief and of the Tribal membership were a justified "exercise of the retained powers ... to establish a Tribal Council where all members are recognized as persons of honor, law abiding, and of good character." Tribal Court Order at 11 & 3. We believe that the Tribal Court made a sufficient inquiry into this matter of traditional law, and because the Tribal mem-

bership also ratified Hereditary Chief Old Bear's sections, we agree.

Most important here is the fact that the great majority of the Tribe publicly ratified Chief Old Bear's actions, and affirmatively agreed more than once to the choice of each of the Bear Councilmembers. It is an extraordinary concept that such action would *not* be sufficient to effect a change in tribal leadership. The Tribe literally had no other mechanism to remove the Walker Council in a timely fashion. The BIA cannot assist in these internal matters, and no federal or state court forum is available. Nor should it be. Given that the Tribal Court did not yet exist, there was no other forum to resolve this dispute, save for under traditional Tribal principles and by popular mandate. As in any democratic form of government, it is the people who must choose the legitimate Tribal government. When the Walker Council ignored the lawful recall procedures and frustrated the will of the people, the constitutional road map could not function properly. A government that does not follow the law cannot then hide behind it. It was appropriate for the Tribal membership to resort to the traditional Tribal practice when formal procedures broke down.

b. Tribal membership's authority under Tribal Constitution.

Second, we affirm that the Tribal membership does, indeed, retain empower to determine the fitness of members of the Tribal Council under the plain language of the Tribal Constitution. *See* Tribal Const., Art. IV ' 2. This provision is included in the portion of the Tribal Constitution entitled "Article IV—Composition and Qualifications of Governing

Body," while separate sections deal with elections and recalls. *See* Tribal Const., Arts. V, XII. But there is no express limitation upon the Tribal membership implementing this provision, in conjunction with the Hereditary Chief's legitimate exercise of traditional Tribal law, in order to effect the removal of a Tribal council. In light of the Walker Council's unconstitutional refusal to set a new election, the Hereditary Chief and Tribal membership took a lawful route to remove the Walker Council.

API would retroactively strip the Tribe of any recourse to remove a Tribal Council the Tribe no longer wanted, forcing it to wait until the fall 2003 elections and federal recognition. But no one could predict that the BIA would refuse to extend recognition to the Bear Council until that late date. The record does not show that the BIA clearly explained its refusal, nor that the fall 2003 elections were conducted under different circumstances than the May 2003 election. This result would be both absurd and unintended. *Any* of the actions taken by Chief Old Bear, at least once ratified by the Tribal membership, were sufficient to make the Bear Council the official Tribal Council for the purpose of the Tribe's dealings at least with private third parties, if not federal agencies. Therefore, the Tribal Court properly held that the Hereditary Chief's actions of April 14, 2003 at the General Council and the Special Election on May 22, 2003 were sufficient to effect a change in Tribal leadership. We need not consider any of the later actions the parties discuss. Because the Walker Council was without actual authority to enter the API Contract in June 2003, it is invalid and nonbinding on the Tribe.

F. Jurisdiction over API.

The Tribe's ability to actually recover from API on its underlying claims, which have yet to be decided by the Tribal Court, depends upon whether the Tribal Court has jurisdiction over API.[10]

a. Personal jurisdiction over API.

The Tribal Court properly determined that it had personal jurisdiction over API under Tribal Code Sections 5-4102(2)-(8), and API has not challenged that determination. Except as limited by other federal or Tribal law, the Tribal Court has broad personal jurisdiction over persons, including nonmembers, who conduct business or take other actions within the Settlement. API unquestionably "conducted business" within the settlement, "used" property within the Settlement, and is alleged to have "committed a tortious act" within the Settlement, amongst other grounds. §§ 5-4102(2)-(8).

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[10] We do note, though, that certain of the tort claims could likely stand against API even if the API Contract were valid, to the extent that the claims are not dependent upon the Contract. If the Contract were valid, we acknowledge that it could possibly require binding arbitration. *See C & L Ents. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418-19 (2001) (recognizing comprehensive arbitration scheme in contract between tribe and company was a consent to arbitration and a waiver of tribal sovereign immunity). But where the dispute centers on whether the Contract was ever authorized by one of the ostensible parties, there can be no requirement that the dispute be submitted to arbitration.

b. Subject matter jurisdiction under *Montana*.

More detailed analysis is required on the topic of the Tribal Court's subject matter jurisdiction over API in connection with the Tribe's tort claims, the only affirmative claims in the case at the time it was appealed.

The Tribal Code provides the Tribal Court can hear tort claims involving the Tribe and anyone else. Except as limited by federal or other Tribal law, the Tribal Court has original jurisdiction over "all civil causes of action and over all controversies between any persons." § 5-4101. This was the basis for the Tribal Court's determination that it had subject matter jurisdiction.

The question, then, is whether there is any limit in federal law. As a general matter, in addition to their authority to determine their own leadership, tribes retain the inherent power to make both criminal and civil laws, and the inherent power to administer justice. *See, e.g., Iowa Mut. Ins.*, 480 U.S. at 14-15 (1987) ("[t]ribal courts play a vital role in tribal self-government and the Federal Government has consistently encouraged their development.") (citations omitted). Tribes have presumed authority over both their members and their territory, which traditionally included some authority over nonmembers conducting themselves in Indian country. *See id.*; *see also United States v. Mazurie*, 419 U.S. 544, 557 (1975). Tribes also have the power to exclude persons from tribal territory (including trust and other Indian lands). *See, e.g.*, Worcester, 31 U.S. at 561. And "civil jurisdiction over the activities of non-Indians on reservation lands presumptively lies in tribal courts, unless affirmatively limited by a spe-

cific treaty provision or federal statute." *Attorney's Process and Investigation Servs.*, 401 F. Supp. 2d at 958, *citing Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996), *citing Iowa Mut. Ins. Co.*, 480 U.S. at 16.

These powers remain intact until and unless preempted by federal authority; "[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence ... is that the sovereign power ... remains intact." *Merrion*, 455 U.S. at 148 n.14; *see also Martinez*, 436 U.S. at 60 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent").

Federal law does impose certain limits on tribal civil adjudicatory jurisdiction, relating to nonmembers. *See Montana*, 450 U.S. at 565; *see also Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 28 Sect. 2709 (2008); *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997). The Supreme Court has stated that "a tribes inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations." *Montana*, 450 U.S. at 564; *see also Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.").

The *Montana* case addresses the general rule of that there is no tribal jurisdiction over the activities of nonmembers, and also identifies the two exceptions. The first *Montana*, exception is where there is a "consensual relationship" between a tribe and a

nonmember, including "commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. This does not apply to the Tribe's tort claims--as API correctly points out, these are premised on *lack* of consent and turn on the Tribe's claim that there was no valid Contract. *See* API Br. at 12.

But the second *Montana* exception does potentially apply to tort claims a tribe asserts against a nonmember.

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S at 565-66.

It is easier by far to find federal cases refining to apply this second exception, than those allowing it. To invoke it, the Supreme Court has stated that the tribal impact must be "*demonstrably serious and must imperil* the political integrity, the economic security, or the health and welfare of the Tribe." *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989) (emphasis added). Most recently, the Supreme Court in *Plains Commerce Bank* confirmed that "[t]he second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' conduct *menaces* the political integrity, the economic security, or the health or welfare of the tribe." 128 S. Ct. at 2726 (emphasis added). The Supreme Court went so far as to quote a commentator who suggested that

"th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert *catastrophic consequences*." *Id.*, *citing* F. Cohen, Cohen's Handbook on Federal Ind. Law, § 4.02(3)[c], at 232, n.220 (emphasis added). And the Eighth Circuit recently refused to apply the second *Montana* exception where only "the personal health and welfare of a few individual members" were involved. *Nord v. Kelly*, 520 F.3d 848, 856-57 (8th Cir. 2008) (declining to apply second exception where injured plaintiff was tribal member suing based on accident on state highway running through Red Lake Reservation). What these cases do is demarcate the outer limits of the second *Montana* exception in order to justify an exercise of tribal jurisdiction under the second exception, a nonmember's conduct must in some way severely threaten the entire tribe's political integrity, economic security, or health and welfare.

Tribal powers are at their zenith of inherent sovereign authority over Indian trust lands within their reservations. Correspondingly, this provides the strongest basis upon which to articulate tribal jurisdiction over nonmembers. A key issue under the *Montana* analysis remains where the conduct took place. *Montana* by its terms applied only to conduct by nonmembers on fee land, and did not speak to nonmember conduct on trust land. 450 U.S. at 565-66. Since then, *Strate* and other cases have extended the *Montana* analysis to other land types within reservations, but we are not aware of any precedent where a federal court has done so for trust land. *See, e.g.*, *Strate*, 520 U.S. at 453 (equating a state right-of-way with non-Indian owned fee land for purposes of *Montana* analysis); *Hicks*, 533 U.S. at 360 (refusing to extend tribal adjudicatory jurisdic-

tion over nonmembers conducting themselves on fee land owned by an individual Indian and within a reservation); *Plains Commerce Bank*, 128 S. Ct. at 2726 (tribe could not assert regulatory jurisdiction over sale of fee land within reservation by one nonmember bank to nonmember purchaser).

The Supreme Court has recently confirmed that "[t]he status of the land 'is relevant insofar as it bears on the application of Montana's exceptions' ... ." *Plains Commerce Bank*, 128 S. Ct. at 2720, *citing Hicks*, 533 U.S. at 376 (reservation land status is "one factor to consider" in determining whether an exercise of tribal authority over nonmembers was "necessary to protect tribal self-government or to control internal relations") (internal citation omitted). In the *Plains Commerce* opinion, the Supreme Court repeatedly reiterated that one of the lynchpins of the decision, in which the Court found no tribal jurisdiction, was that the land in question was *fee* land. 128 S. Ct. at 2726 (highlighting that *Montana* analysis applies to *non-Indian fee land*) (emphasis added); *id.* at 2722, *citing Hicks*, 533 U.S. at 360 (stating that with only the exception of *Brendale*, 492 U.S. at 408, the Court has "never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.") (emphasis in original); *id.* at 2723 ("[c]ertain forms of nonmember behavior, even on *non-Indian fee land*, may sufficiently affect the tribe as to justify tribal oversight.") (emphasis added). Moreover, the tribe in *Plains Commerce Bank* could not show that there was any "conduct" on the reservation fee land that affected the tribe whatsoever, only the fact of the sale itself, which the tribe had attempted to regulate. *Id.* at 2723-24.

We hold that one key fact of this case is that the issue presents nonmember conduct on trust land. We do not believe that *Montana* applies to such conduct at all, and neither the Supreme Court nor any of the federal circuit courts has held to the contrary. Under its inherent sovereign powers to legislate, to make laws governing conduct, and to exclude those who enter the Settlement, and under the Tribal Constitution and Bylaws, the Tribe retains *presumptive* civil jurisdiction over nonmembers committing torts on tribal trust land.

To the extent that a *Montana* exception is necessary to recognize tribal court jurisdiction, it does apply, this is the rare case that squarely falls within the second *Montana* exception, even under the most limited reading of tribal jurisdiction. This case is based upon allegedly egregious torts that nonmember API committed against the entire Tribe by converting Tribal funds and by storming the Tribal Center and Casino on behalf of the ousted Walker Council. The allegations in the Complaint are that API expressly contracted to address significant Tribal governmental issues, and to exercise essentially Tribal governmental authority.

The locus of the allegedly tortious nonmember conduct was the 'Tribal Community Center and Casino, which is on trust land within the Tribe's reservation. This is the Tribe's economic engine, and is where some of the Tribe's most sensitive documents are kept. It was precisely these things over which API sought control, on behalf of the Walker Council. Any tortious activity in which a nonmember engages, directly aimed at the Tribe's gaming operations, while on trust land, is more than sufficient

grounds to justify the Tribal Court exercising civil adjudicatory jurisdiction over the nonmember.

Regardless of the limits of tribes' civil regulatory and adjudicatory jurisdiction over nonmembers, *Plains Commerce* and other post *Montana* cases make plain that where a nonmember engages in this type of violent, tortious conduct on trust land, they come squarely within the Tribe's jurisdiction. This Court agrees that it is difficult to conceive of conduct that would constitute a more direct threat to the political integrity, the economic security, *and* the health and welfare of the Tribe. The Tribe's claims include a moat for conversion of more than Si million of Tribal money. *See* Tribal Court Order at 61 12. The Walker Council paid APT these fluids in exchange for API's performance of some of the actions that the Tribe alleges were tortious, including API's strike force of "30 enforcers," some of whom were armed, and who on October 1, 2003 allegedly broke into the Tribe's Community Center and Casino. Compl. at 5 ¶ 32. The Tribe's other claims arise from this conduct and allege property damages and appropriation of trade secrets. *Id.* at 3 to 3 ¶¶ 13-16, 4 ¶¶ 17-19. This display of fame was an attempt by the Walker Council, with API's support, to seize both political and economic control of the Tribe, despite the fact that the Tribal members had overwhelmingly rejected the Walker Council and chosen the Bear Council. The means of doing so was through API, which had no authority from the real representatives of the Tribe to be there. This action was a direct threat to every aspect of tribal integrity, and to the right of the Tribe to "make its own laws and be governed by them." *Hicks*, 533 U.S. at 361. API's voluntary conduct falls within the second Montana exception and justifies the Tribal Court's exercise of

jurisdiction over API for purposes of hearing the Tribe's tort claims.

G. Doctrine of apparent authority.

API also argues that, under the doctrine of apparent authority, the API Contract should be enforced against the Tribe. *See* API Br. at 23-24. The Tribal Court did not reach this question. Nevertheless, we deal with this as a matter of law, and as a matter of first impression here. We hold that the doctrine of apparent authority does not apply to Tribal contracts, and there is no need for remand.

First and foremost, there is no written provision in Tribal law providing for the defense of "apparent authority," or promissory estoppel, and no party has argued that there is a basis in Tribal common law for this tort defense to be asserted against the Tube. *See* §1-2101 ("The common law of the Tribe expressly does not include the common law of any other Indian tribe, the common law of England, the United States or any other foreign jurisdiction ...."). And even under U.S. common law, a third party "is expected to know the law and may not rely on the conduct of Government agents contrary to the law." *Heckler v. Cmty, Health Servs.*, 476 U.S. 51, 63 (1984); *see also Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 389 (1947). While this principle is most commonly applied to bar recovery for agreements with unauthorized, purported agents of the government, it applies equally where there is reason to doubt that an entity holding itself out as the highest level of government is, indeed, just what it says it is, in light of evidence to the contrary. In these circumstances, the Tribe cannot be held responsible. While we expect any application of the rule in the future to apply primarily to individual dealings with Tribal agents, and do not

reach the question of possible exceptions under other scenarios, we adopt the rule that the doctrine of apparent authority does not apply against the Tribes.[11]

The undisputed facts also demonstrate that, even were the defense of apparent authority available, API could not prevail. API cannot show that it in good faith "relied" on the false representation of the actual Tribe, which was represented by that time by the Bear Connell. API was fully aware of the leadership dispute. Nor is there any claim that API affirmatively knew of or relied on the federal-agency position. The Walker Council entered the API Contract expressly for the purpose of expelling "tribal dissidents," or those associated with the Bear Council, from the Tribe's gaming operation. Tribal Court Order at 6 ¶¶ 10-11; API App'x at Tab 6, Ex. B (API Contract). While there is no record of whether API actually was aware of the May 2003 Special Election, it proceeded at its own risk, under these circumstances. A company engaged in such a line of work ought to proceed with extreme caution.

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[11] We reject the reasoning of *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107.P.3d 402 (Colo. Ct. App., Div. II 2004). *See* API Br. at 24. It is a nonbinding, minority opinion from a state court of appeals. Moreover, it contains serious errors of law. For example, *Rush Creek* curiously holds that someone without actual authority to waive a tribe's sovereign immunity can nevertheless do so, simply by using effective waiver *language*. This is contrary to Supreme Court precedent. *See Martinez.*, 436 U.S. at 49; *Kiowa Tribe of Okla. v. Mfg. Techs Inc.*, 523 U.S. 751 (1998); *Okla. Tax Common v. Citizen. Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). We doubt that the state or federal governments would countenance waivers of their own sovereign immunity by those without authority to give them. We decline to do so either.

III. Conclusion.

For the foregoing reasons, it is hereby ordered that the Tribal Court's order is SUSTAINED.

For the Court unanimously,

Date: 12/23/08

/s/_____
Henry M. Buffalo, Jr.
Chief Justice

National Indian Gaming Commission

NOTICE OF VIOLATION

No. NOV-03-02

Notice of Violation

To: Alexander Walker
Sac and Fox Tribe of the Mississippi in Iowa
2982 F Avenue
Montour, IA 50173

Homer Bear, JI.
Sac and Fox Tribe of the Mississippi in Iowa
349 Meskwaki Road
Tama, IA 52339-9629

Sac and Fox Tribe of the Mississippi in Iowa
349 Meskwaki Road
Tama, IA 52339-9629

Respondents

1. The Chairman of the National Indian Gaming Commission (NIGC) hereby gives notice that Respondents are in violation of the Indian Gaming Regulatory Act (IGRA), NIGC regulations, and the Gaming Ordinance of the Sac and Fox Tribe of the Mississippi in Iowa (Tribe).

2. The Sac and Fox Tribe of the Mississippi in Iowa is a federally recognized Indian Tribe with tribal headquarters in Tama, Iowa.

3. NIGC defers to the Secretary of the Interior in areas in which the Secretary has expertise. The Secretary, through the Bureau of Indian Affairs, has ex-

pertise in recognizing whether a group should be recognized as a tribe and, when there are competing factions, which faction should be recognized as the tribal government. IGRA acknowledges the Secretary's expertise by defining, for the purposes of Indian gaming, an "Indian tribe" as an organized group that "is recognized as eligible by the Secretary [of the Interior] for the special programs and services provided by the United States...." 25 U.S.C. 2703(5)(A). Gaming conducted by an entity other than an Indian tribe or an entity licensed by the tribe is not Indian gaming under IGRA and may not, therefore, be conducted on Indian lands.

4. The circumstances of the violations are:

A. The Tribe has engaged in gaming under the Indian Gaming Regulatory Act (IGRA or the Act) on tribal lands located in Iowa pursuant to the Tribe's Gaming Ordinance first approved in 1995 (Exhibit 1).

B. IGRA, NIGC's regulations, and the Tribe's gaming ordinance require that the Tribe have the sole proprietary interest in and the sole responsibility or the conduct of gaming on the Tribe's lands. 25 U.S.C. 2710(b)(2)(A); 25 C.F.R. § 522.4(b)(1); Gaming Ordinance, Section 1.04.

C. IGRA and NIGC's regulations require that tribes operate their gaming facilities in a manner that adequately protects public health and safety. 25 U.S.C. 2710(b)(2)(E); 25 C.F.R. § 522.4(b)(7). The Tribe's gaming ordinance provides that "maintenance of any gaming facility, as well as the operation of any gaming, by the Tribe shall be conducted in a manner which adequately protects

... the public health and safety." Gaming Ordinance, Section 1.06.

D. NIGC's regulations require that authorized tribal officials be allowed to enter and inspect gaming facilities. 25 C.F.R. § 573.6(a)(9).

E. On March 26, 2003, a council appointed by the hereditary chief physically assumed control over the Tribe's gaming operation and excluded from the facility Respondent Walker and persons acting under the direction of Mr. Walker and the elected Tribal Council (Exhibit 2).

F. On April 1, 2003, Acting Assistant Secretary for Indian Affairs, Aurene Martin, stated that the U.S. Department of the Interior recognizes the elected Tribal Council, led by Alex Walker, Jr., as the Tribe's leadership (Exhibit 3). Acting Assistant Secretary Martin speaks for the Secretary of the Interior on matters involving tribal governments.

G. The tribal government recognized by the Secretary of the Interior is not in control of the Tribe's gaming operation and remains excluded from the premises by the occupying group (Exhibit 2).

5. The gaming at Meskwaki is not being conducted by the Tribe—that is, by the governmental authority recognized by the Secretary of the Interior—or by an entity licensed by the tribal government pursuant to the NIGC's regulations. As a result, the following violations are occurring:

A. The federally recognized tribal government is being deprived of the sole proprietary interest in and responsibility for the gaming operation;

B. The forcible occupation of the gaming operation and tribal offices by Respondent Bear's appointees leaves the federally recognized government unable to regain control without the use of force, thereby creating a threat to public safety, thus violating IGRA, NIGC's regulations, and the Tribe's ordinance which require that a gaming facility be operated in a manner that does not threaten public safety; and

C. The forcible occupation of the gaming operation by Respondent Bear's appointees makes impossible the entrance and inspection of the operation by a tribal official who is authorized by the federally recognized tribal government.

6. To correct the violations, Respondents shall:

No later than 5:00 p.m., May 2, 2003, allow the federally recognized tribal government access to and control of the Tribe's gaming facility.

7. Appeal. a. Within thirty (30) days after service of this Notice of Violation and Order of Temporary Closure, Respondent may appeal to the full Commission under 25 C.F.R. Part 577 by submitting a notice of appeal and, if desired, a request for hearing to the National Indian Gaming Commission, 1441 L Street, NW, Ninth Floor, Washington, DC 20005. Respondent has a right to assistance of counsel in such an appeal. A notice of appeal must refer to this Notice of Violation.

b. Within ten (10) days after filing a notice of appeal, Respondent must file with the Commission a supplemental statement that states with particularity the relief desired and the grounds therefore and that includes, when available, supporting evidence in the form of affidavits. If Respondent wishes to present oral testimony or witnesses at the hearing, Respondent must include a request to do so with the supplemental statement. The request to present oral testimony or witnesses must specify the names of proposed witnesses and the general nature of their expected testimony, whether a closed hearing is requested and why. Respondent may waive its right to an oral hearing and instead elect to have the matter determined by the Commission solely on the basis of written submissions.

9. Fine—Submission of Information. The violations cited above may additionally result in the assessment of civil fines against Respondent in an amount not to exceed $25,000 per violation per day. Under 25 C.F.R. § 575.5(a), Respondent may submit written information about the violation to the Chairman within fifteen (15) after service of this notice of violation (or such longer period as the Chairman of the Commission may grant for good cause). The Chairman shall consider any information submitted in determining the facts surrounding the violation and the amount of the civil suit, if any.

Dated: April 30, 2003.

Philip N. Hogan
Chairman
National Indian Gaming Commission

NATIONAL INDIAN GAMING COMMISSION
TEMPORARY CLOSURE ORDER

No. CO-03-02
Order of Temporary Closure

To: Alexander Walker, Jr.
Sac and Fox Tribe of the Mississippi in Iowa
2982 F Avenue
Montour, IA 50173
Fax: (641) 484-5424

Homer Bear, Jr.
Sac and Fox Tribe of the Mississippi in Iowa
349 Meskwaki Road
Tama, IA 52339-9629
Fax: (641) 484-5424

Sac and Fox Tribe of the Mississippi in Iowa
349 Meskwaki Road
Tama, IA 52339-9629
Fax: (641) 484-5424

Rennetta Plander
Gaming Manager
Meskwaki Bingo Casino Hotel
1504 30Sth St.
Tama, IA 52339-9697
Fax: (641) 484-1618

Respondents

1. The Chairman of the National Indian Gaming Commission (NIGC) hereby gives notice that Respondents are in substantial violation of the Indian Gaming Regulatory Act (IGRA), NIGC regulations,

and the Gaming Ordinance of the Sac and Fox Tribe of the Mississippi in Iowa (Tribe).

2. The Sac and Fox Tribe of the Mississippi in Iowa is a federally recognized Indian Tribe with tribal headquarters in Tama, Iowa.

3. NIGC defers to the Secretary of the Interior in areas in which the Secretary has expertise. The Secretary, through the Bureau of Indian Affairs, has expertise in recognizing whether a group should be recognized as a tribe and, when there are competing factions, which faction should be recognized as the tribal government. IGRA acknowledges the Secretary's expertise by defining, for the purposes of Indian gaming, an "Indian tribe" as an organized group that "is recognized as eligible by the Secretary [of the Interior] for the special programs and services provided by the United States...." 25 U.S.C. 2703(5)(A).. Gaming conducted by an entity other than an Indian tribe or an entity licensed by the tribe is not Indian gaming under IGRA and may not, therefore, be conducted on Indian lands.

4. The circumstances of the violations are:

A. The Tribe has engaged in gaming under the Indian Gaming Regulatory Act (IGRA or the Act) on tribal lands located in Iowa pursuant to the Tribe's Gaming Ordinance first approved in 1995.

B. On March 26, 2003, a council appointed by the hereditary chief and led by Homer Bear, Jr., physically assumed control over the Tribe's gaming operation, the Meskwaki Bingo Casino Hotel in Tama, Iowa, and physically excluded from the facility Respondent Walker and persons acting

under the direction of Mr. Walker and the elected Tribal Council.

C. On April 1, 2003, Acting Assistant Secretary for Indian Affairs, Aurene Martin, stated that the U.S. Department of the Interior recognizes the elected Tribal Council, led by Alex Walker, Jr., as the Tribe's leadership. Acting Assistant Secretary Martin speaks for the Secretary of the Interior on matters involving tribal governments.

D. On April 30, 2003, NIGC issued a Notice of Violation, NOV-03-02, Attachment I, for: depriving the tribe--represented by its federally recognized tribal leadership—of sole proprietary interest in and responsibility for the gaming operation in violation of 25 U.S.C. 2710(b)(2)(A), 25 C.F.R. § 522.4(b)(1), and Gaming Ordinance, Section 1.04; threatening public safety by forcible occupation of the gaming operation and tribal offices by a dissident faction in violation of 25 U.S.C. 2710(b)(2)(E), 25 C.F.R. § 522.4(b)(7), and Gaming Ordinance, Section 1.06; and denying the recognized tribal government of access to the gaming operation in violation of 25 C.F.R. § 573.6(a)(9). NOV-03-02 directed the Respondents to turn over the operation of the casino to the recognized government by 5:00 p.m., May 2, 2003.

E. As of today, the violations cited in NOV-03-02 have not been cured and are ongoing.

5. Under 25 C.F.R. § 573.6(a), the Chairman of NIGC may issue an order of temporary closure if one of twelve (12) enumerated substantial violations is present. Under 25 C.F.R. § 573.6(b), the operator of

an Indian gaming operation must close the operation upon service of an order of temporary closure unless the order provides otherwise. Respondents have committed the following substantial violations:

A. Respondents have failed within the time permitted in NOV 03-02 to correct the violations cited (25 C.F.R. § 573.6(a)(1)(i));

B. The gaming operation has refused to allow an authorized tribal official of the federally recognized government to enter the gaming operation (25 C.F.R. § 573.6(a)(9)); and

C. By their forcible occupation of the gaming operation and tribal offices, Respondent Bear's appointees have failed to operate the gaming facility in a manner that does not threaten public safety (25 C.F.R. § 573.6(a)(12)).

6. To correct the violations, Respondents shall comply with the following closure order.

Closure Order

Under the authority of 25 U.S.C. §§ 2701–2721 and 25 C.F.R. § 573.6(a) and (b), the Chairman of the National Indian Gaming Commission hereby gives notice that Respondents are ordered to cease and desist from all gaming activity in the Meskwaki gaming facility. This order is effective immediately. The Chairman may rescind the Closure Order for good cause shown.

7. Expedited Review. Under 25 C.P.R. § 573.6(c), within seven (7) days after service of this Order, a Respondent may request, orally or in writing, informal expedited review by the Chairman. The Chairman must complete such review within two (2) days

after receipt of a timely request. Within two (2) days after the expedited review provided by 25 C.F.R. § 573.6(c), the Chairman must decide whether to continue the Order and must provide a Respondent with an explanation of the basis for the decision.

8. Appeal.

A. Whether or not a Respondent seeks the informal expedited review described above, a Respondent may appeal within 30 (thirty) days after service of this Notice of Violation and Order of Temporary Closure to the full Commission under 25 C.F.R. Part 577 by submitting a notice of appeal and, if desired, request for hearing to the National Indian Gaming Commission, 1441 L Street, NW, Ninth Floor, Washington, DC 20005. A Respondent has a right to assistance of counsel in such an appeal. A notice of appeal must refer to this Notice of Violation and Order.

B. Within ten (10) days after filing a notice of appeal, a Respondent must file with the Commission a supplemental statement that states with particularity the relief desired and the grounds therefore and that includes, when available, supporting evidence in the form of affidavits. If a Respondent wishes to present oral testimony or witnesses at the hearing, a Respondent must include a request to do so with the supplemental statement. The request to present oral testimony or witnesses must specify the names of proposed witnesses and the general nature of their expected testimony, as well as whether a closed hearing is requested and why. A Respondent may waive the right to an oral hearing and instead elect to have the matter determined by the Commission solely on the basis of written submissions.

Dated: May 12, 2003.

Phillip N. Hogen
Chairman
National Indian Gaming Commission

Cynthia K. Shaw
Staff Attorney
National Indian Gaming Commission

NATIONAL INDIAN GAMING COMMISSION

In the Matter of
Sac and Fox Tribe of the Mississippi in Iowa,

NOV/TCO CO-03-02
Docket No. NIGC 2003-1
September 10, 2003

DECISION AND ORDER

Appeal to the National Indian Gaming Commission ("NGIC" or "Commission") from a Temporary Closure Order ("TCO"), issued by the NIGC Chairman ("Chairman") and directed at the Meskwaki Casino Bingo Hotel ("Casino"), owned and operated by the Sac and Fox Tribe of the Mississippi in Iowa ("Tribe"), a friendly recognized Indian tribe with tribal headquarters in Tama, Iowa.

Appearances:

Cynthia Shaw, Esq., and John Hay,, Esq., for the Chairman, NIGC
Christopher Karns, Esq., for the Elected Walker Council ("Walker Council")

Presiding Official:

Andrew Pearlstein, Office of Hearing and Appeals, U.S. Department of the Interior

ORDER

After careful and complete review of the agency record (consisting of 25 documents), pleadings filed by the Walker Council and the Chairman, the

Chairman's Decision Upon Expedited Review, the Presiding Official's Recommended Decision, and the July 22, 2003 letter from Steven Olson ("Olson letter"), attorney for the Bear Faction to the Presiding Official ("PO"), with attached July 16, 2003, letter from the Bear Faction to Alex Walker, Jr. ("Bear letter"), the Commission finds that:

1. The Chairman bears the burden of proof in administrative appeals of enforcement actions. The proper standard of review is a preponderance of the evidence.

2. The Olson letter and the Bear letter constituted an improper ex parte communication.

3. The improper ex parte communication did not so taint the decision-making process so as to make the ultimate decision of the agency unfair.

4. The Commission rejects in its entirety the PO's Recommended Decision because the PO exceeded the scope of review when he addressed issues not raised on appeal. The appropriateness of the sanction imposed by the Chairman was the sole issue raised by the parties for review on appeal.

5. To determine whether closure of the Casino is the appropriate sanction, or whether a civil fine assessment is appropriate, we must first decide who is the recognized tribal leadership, legally authorized to govern the Tribe.

6. We defer to the Secretary of the Interior's determination as to the recognized tribal leadership. The Secretary recognizes the Walker Council. The Walker Council is not currently in control of the tribal government or the Tribe's gaming operation.

7. Because the federally recognized tribal leadership is not in control of either the tribal government or the Tribe's gaming operation, the gaming is, in effect, unregulated, and closure of the Casino is the only appropriate remedy.

8. We find that closure of the Casino is based on substantial, uncontested violations and is the only appropriate remedy, and, therefore, make permanent the Order of Temporary Closure.

9. Gaming may resume if, upon a petition by the Tribe to rescind the Closure Order, the Commission is convinced, following a visit by a designated NIGC employee(s), that the Tribe, acting through a duly elected, federally recognized Tribal Council, is in control of the Tribe and Casino, and that no violations of the IGRA, NIGC regulations or the Tribe's Gaming Ordinance exist.

PROCEDURAL AND FACTUAL BACKGROUND

The Sac & Fox Tribe of Mississippi in Iowa is a federally recognized Indian Tribe with headquarters in Tama, Iowa. The NIGC Chairman approved the Tribe's Gaming Ordinance on February 9, 1995. (AR#24). The Tribe then built and opened the Meskwaki Bingo Hotel and Casino.

The federally recognized governing body of the Tribe is a seven-member Tribal Council. Its elected Chairman is Alexander Walker, Jr., whose term began in November 1999 and runs through November 2003. In September 2002, members of the dissident faction, led by Homer Bear ("Bear Faction"), circulated and presented recall petitions seeking to re-

move Chairman Walker and the rest of his Council from their positions before expiration of their terms under the Tribe's Constitution. The Walker Council disputed the validity of the petitions under the Tribal Constitution and refused to hold a recall election. (Walker Affidavit, pp. 5-6). No such election has been held to date.[1]

On March 26, 2003, the "hereditary chief" of the Tribe appointed Homer Bear, Jr. as the Chairman of the Tribal Council.[2] Mr. Bear and his appointees then assumed control of the Casino, as well as the Tribal government offices located in the Tribal Center. The Bear Faction appointed a new Casino General Manager and Tribal Gaming Commission Chairperson. (AR#7, p. 3, n.3).

On April 1, 2003, Aurene Martin, Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior, asserted in a letter to Iowa Congressman Leonard Boswell that "the Department continues to recognize the elected Tribal Council led by Alex Walker, Jr., as the leadership of the Tribe."

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[1] We understand that an election is scheduled for October 21, 2003, that the Bureau of Indian Affairs will supervise the election, and that the Walker and Bear factions will be bound by the results of this election. The parties have not asked us to stay our proceedings pending the outcome of this election, and we do not elect to do so *sua sponte*.

[2] In a related case, *In re: Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litigation*, Nos. 03-2329/2355/2357/2390/2392/2393, 2003 U.S. App. LEXIS 17897 at* 3-4 (8th Cir. August 27, 2003), the Court noted that there is no provision under the Tribal Constitution authorizing the appointment of a Tribal Council by a hereditary Chief of the Tribe.

(AR# 20). In a letter to Mr. Bear dated May 9, 2003, Terrance L. Virden, Deputy Commissioner of Indian Affairs with the Department's Bureau of Indian Affairs, cited the Martin letter to the same effect – that the BIA continues to recognize the Walker Council as the elected leadership of the Tribe. (AR#1). Previous correspondence from the BIA stated that the BIA did not have the authority to intervene in the internal tribal leadership dispute. (AR# # 13, 21).

On April 30, 2003, the NIGC Chairman issued Notice of Violation ("NOV"), NOV-03-02 (AR#9). In the NOV, the Chairman concluded that the Tribe was in violation of the IGRA and NIGC regulations as a result of the takeover by the Bear Faction because (1) the federally recognized tribal government was deprived of the sole proprietary interest in and responsibility for the gaming operation; (2) an authorized tribal official was denied access to enter and inspect the Casino; and 3) the occupation of the Casino presented a threat to public safety. The Chairman stated that to correct the violations, Respondents shall, "no later than 5:00 p.m., May 2, 2003, allow the federally recognized tribal government access to and control of the Tribe's gaming facility." (AR#9).

On May 12, 2003, the Chairman issued a Temporary Closure Order (AR#25). The underlying bases for the TCO are three substantial violations alleged in the NOV. The TCO required the immediate closure of the Casino, pursuant to 25 C.F.R. § 573.6.

Although Homer Bear, Jr., and the Tribe, were named as Respondents in the NOV and TCO, and served with copies of each, the Bear Faction did not appeal the NOV, nor did it seek expedited review of

the TCO or appeal the TCO. Instead, it continued to operate the Casino until May 23, 2003, when U.S. Marshals closed the casino. In a related case, *In re: Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litigation*, Nos. 03-2329/2355/2357/2390/2392/2393, 2003 U.S. App. LEXIS 17897 at* 3-4 (8th Cir. August 27, 2003).

Alexander Walker, Jr., along with the Sac and Fox Tribe of Mississippi in Iowa ("Walker Council"), were named as Respondents in both the NOV and TCO. The Walker Council also did not appeal the NOV. It did, however, on June 12, 2003, appeal the TCO. Prior to that, on May 19, 2003, the Walker Council had requested informal expedited review of the TCO pursuant to 25 C.F.R. § 573.6(c). Chairman Walker and the Tribe requested that the TCO be rescinded in favor of other coercive measures for compliance against Respondent Homer Bear. Alternatively, Chairman Walker and the Tribe requested that the Order be modified to delay the effective date of the closure and to incorporate language clarifying the circumstances under which the Tribe would be permitted to conduct gaming.

On May 23, 2003, the Chairman issued a Decision Upon Expedited Review, denying the requests of Chairman Walker and the Tribe to rescind or modify the Order. Earlier that same morning, U.S. Marshals closed the Casino pursuant to a federal district court order. The Casino has remained closed since that date.

On June 12, 2003, Christopher Karns, Esq., of the law firm of Dorsey & Whitney, on behalf of the Respondent Alex Walker, Jr., and the Tribe, filed a Notice of Appeal of the Chairman's Order temporar-

ily closing the Casino.[3] On June 17, 2003, the NIGC requested that this appeal be referred to a presiding official to conduct a hearing and issue a recommended decision, pursuant to the NIGC's administrative rules providing for such a referral as part of its appeals process.[4] Subsequently, in accordance with an agreement between the Department of the Interior's Office of Hearings and Appeals and the NIGC, this appeal was promptly referred to Administrative Law Judge Andrew Pearlstein as the designated PO.

On June 20, 2003, the Walker Council filed its Supplemental Statement in Support of Appeal from Order of Temporary Closure ("Supplemental Statement"). In its Supplemental Statement, the Walker Council states that it elect[s] to have the Commission determine the matter based solely on written submissions, provided that Respondent Homer Bear did not request an oral hearing and the presentation of witness testimony. (Mr. Bear not only did not request an oral hearing, but, as stated previously, failed to file an appeal altogether). The Walker Council further states that "the Tribe and its federally recognized Tribal Council acknowledge the cir-

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[3] CO-03-02, Order of Temporary Closure, dated May 12, 2003.

[4] In pertinent part, the NIGC regulations, at 25 C.F.R. § 577.4, provide:

> (a) the Commission shall designate a presiding official who shall commence a hearing within 30 days after the Commission receives a timely notice of appeal from the Respondent.

cumstances in the NOV..." (Supplemental Statement at 2).

In a conference call held on June 23, 2003, the Walker Council and the NIGC agreed that this matter could be resolved appropriately by means of written submissions, without an evidentiary hearing. On July 10, 2003, after confirming receipt of written submissions from the NIGC and the Walker Council, the PO closed the administrative record. The Bear Faction did not participate in the conference call.

On July 16, 2003, the PO sent the NIGC, the Walker Council and the Bear Faction a notice concerning possible resolution of the matter through settlement or alternative dispute resolution. On July 22, 2003, the Bear Faction, by its attorney, Steven Olson, Esq., sent a letter to the PO in response to his inquiry to the NIGC and named respondents about the possibility of settling the dispute. Attached to the Olson letter was a copy of a July 16, 2003, letter from Homer Bear, Jr., to Alex Walker, Jr. Neither the NIGC nor the Walker Council were sent copies of the July 22 Olson letter and the accompanying July 16 letter from Bear to Walker until August 15, 2003, after the PO issued his Recommended Decision. It is apparent from the PO's August 15 letter that he was not aware, at that time, that the Olson and Bear letters were an ex parte communication. It appears that this did not come to his attention until after his Recommended Decision was issued.

On August 11, 2003, the PO issued his Recommended Decision, finding that none of the bases for closure had a sufficient factual basis and recommending that the TCO be dissolved and the Casino reopen. In a letter from the PO to the NIGC, the

Walker Council and the Bear Faction, dated August 15, 2003, the PO revealed the existence of the July 22 letter and the attached July 16 letter for the first time, and acknowledged that the correspondence "was apparently not copied by Mr. Olson to the NIGC or to counsel for the Tribe or Walker faction." The PO also acknowledged reading the July 22 and July 16 letters. Both letters appear to have been read by the PO before he issued his Recommended Decision on August 11,[5] although he specifically noted that he did not consider the letters in issuing his Recommended Decision.

On August 22, 2003, the Walker Council and the Tribe objected in writing to the Recommended Decision by the PO, urging the Commission of the NIGC to reject the Recommended Decision in its entirety because of an ex parte communication it believed to be improper, and to remand the matter to a new PO for limited review of the issues raised by the parties to the appeal. The Walker Council also urges rejection of the Recommended Decision based on the PO's consideration of issues beyond the scope of the administrative appeal and seeks remand for consideration of the merits of the sole issue raised by the parties on appeal, i.e. the appropriateness of the sanction. The Walker Council asks that, if the Recommended Decision is adopted, that the Commission

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[5] In the Recommended Decision, the PO mentions that "the parties, as well as the Bear Faction... all responded that mediation had been attempted unsuccessfully, most recently pursuant to an order of the federal Eighth Circuit Court of Appeals, and that such efforts were unlikely to be successful at this point."

reject the PO's findings of fact and conclusions of law that support re-opening of the Casino under the Bear Faction's control. Finally, the Walker Council seeks clarification of the circumstances under which the Tribe will be permitted to re-open its gaming activity, in the event the Commission rejects the Recommended Decision but does not remand the matter.

The NIGC also objected in writing to the PO's Recommended Decision, urging its rejection by the Commission. The NIGC argues that the PO "gravely exceeded his authority" by deciding "fact issues" that were not before him and "reaching into the Agency Record without notifying the actual parties to the litigation that allegations made by Mr. Bear would be the basis for his decision." (Chairman's Objections to Recommended Decision at 11-12).

DISCUSSION

I. Burden of Proof and Standard of Review

In administrative appeals of enforcement actions undertaken pursuant to 25 C.F.R. Part 573, the Chairman bears the burden of proof and the standard of review is a preponderance of the evidence. *In the Matter of JPW Consultants,* NIGC 97-4; NIGC 98-8; November 13, 1998 (citing *In the Matter of Shingle Springs Band of Mewok Indians,* NIGC 97-1, December 3, 1998).

Preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *Id.* at 4. Since the three violations alleged in the NOV as the basis for the TCO are con-

ceded and not contested by the parties, we find each violation to be true for purposes of deciding the sole issue raised by the parties on appeal, i.e. the appropriateness of the Chairman's sanction for the violations.

II. The Olson letter and the Bear letter constitute an improper ex parte communication.

In their written objections to the Recommended Decision issued by the PO, both the NIGC and the Walker Council characterize the July 22 letter, and the accompanying July 16 letter, as an improper ex parte communication. We agree.

Neither the IGRA nor the NIGC's regulations address ex parte communications. We therefore look to the Administrative Procedures Act ("APA")[6], Stan-

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[6] We recognize that the APA's adjudication sections only apply to administrative hearings that are conducted under a statute that specifically provides for hearings to be on the record, 5 U.S.C. § 554(a), and that the NIGC, in the preamble to its appeals regulations, states that the IGRA does not. Vol. 58, No. 13, Fed. Reg. 5839. However, while perhaps not mandatory authority, the APA ex parte provision, and case law interpreting it, are persuasive authority because the adjudicatory regulations the NIGC does have are similar to the other APA adjudications sections, of which the ex parte provision is one subsection. For example, the APA requires that either the agency, one or more members of the agency or one or more administrative law judges preside over the taking of evidence. 5 U.S.C. § 556(b)(1)-(3). The NIGC chose the term, "Presiding Official", and uses the ALJs at the Department of the Interior for this function. The APA requires that "when the agency makes the decision without having presided at the reception of the evidence, the presiding employee...shall first recommend a decision..." 5 U.S.C. § 557(b). The NIGC regulations also provide for a PO to issue a recommended decision. 25 C.F.R. § 577.14.

dards of Conduct for Administrative Law Judges ("ALJs") from the Department of the Interior ("Standards of Conduct"), and case law for guidance.

The APA prohibits any "interested person outside the agency" from making, or knowingly causing, "any ex parte communication relevant to the merits of the proceeding" to any decision-making official. 5 U.S.C. § 557(d)(1)(A). The APA further requires that a person involved in the decision-making process who receives any written ex parte communication must include such communications in the record of the proceeding, as well as all written responses to the communications. 5 U.S.C. § 557(d)(1)(C).

The Standards of Conduct, governing ALJs of the Department of the Interior ("DOI"), and directly applicable to the PO in this case by virtue of his employ by the DOI, generally prohibit an ALJ from receiving and considering ex parte communications, stating:

> (b) Ex parte communication – (1) Prohibition. Except to the extent required for the disposition of ex parte matters as authorized by law, there shall be no communication concerning the merits of a proceeding *between any party to the proceeding or any person interested in the proceeding or any representative of a party or interested person and any office personnel involved or who may reasonably be expected to become involved in the decision making process* on that proceeding, unless the communication, ... if written, is furnished to all other parties. ... The terms "interested person" and "person interested in the agency proceeding" include any individual or other person with an interest in the agency pro-

> ceeding that is greater than the interest that the public as a whole may have.
>
> This regulation does not prohibit communications concerning case status or advice concerning compliance with procedural requirements unless they are of inquiry that is in fact an area of controversy in the proceeding ... . Any written communication made in violation of this regulation shall be included in the record. In proceedings other than informal rulemakings, copies of the ... communication shall be provided to all parties, who shall be given an opportunity to respond in writing. [Emphasis added.]

43 C.F. R. § 4.27(b).

In *Professional Air Traffic Controllers Organization (PATCO) v. Federal Labor Relations Authority (FLRA)*, 685 F.2d 547 (D.C. Cir. 1982), the U.S. Court of Appeals for the D.C. Circuit expounded on the APA's general prohibition on ex parte communications, stating:

> The disclosure of ex parte communications serves two distinct interests. Disclosure is important in its own right to prevent the appearance of impropriety from secret communications in a proceeding that is required to be decided on the record. Disclosure is also important as an instrument of fair decision-making; only if a party knows the arguments presented to a decision-maker can the party respond effectively and ensure that its position is fairly considered. When these interests of openness and opportunity for response are threatened by an ex parte communication, the communication must be disclosed. It matters not

> whether the communication comes from someone other than a formal party or if the communication is clothed in the guise of a procedural inquiry.

Id. at 563.

Clearly, the PO here is involved in the decision-making process. In fact, he is integral to it. The use of a PO is provided for by NIGC regulations. NIGC regulations direct that, in appeals before the Commission, "[t]he Commission shall designate a presiding official..." 25 C.F.R. § 577.4(a).[7] NIGC regulations further provide that the PO shall render a Recommended Decision. 25 C.F.R. § 577.14. The Commission must then consider the Recommended Decision, but may "affirm or reverse, in whole or in part..." the Recommended Decision. 25 C.F.R. § 577.15. Because the Bear Faction's ex parte communication in this matter was directed to the PO, and not copied to or otherwise provided to the parties to the action until after the PO issued his Recommended Decision, it is improper.

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[7] The regulations further provides that the PO shall commence a hearing. However, § 577.3 provides that the Respondent may waive in writing the hearing and elect to have the matter decided on written submissions alone. Respondents Walker and the Tribe have so elected in this case. Respondent Bear did not appeal the NOV or TCO and is, therefore, not a party to this matter on appeal.

III. The Improper Ex Parte Communication Did Not so Taint the Decision-making Process so as to Make the Ultimate Decision of the Agency Unfair.

Both parties urge the Commission to reject the Recommended Decision because of the ex parte communication. The parties argue that the communication has tainted the proceedings, and point to the fact that the PO referenced the ex parte communication in his Recommended Decision. Additionally, the Walker Council asks that the matter be remanded to a new PO to issue a new Recommended Decision. We find that the improper ex parte communication did not so taint the proceedings as to make the ultimate decision of the agency so unfair as to require remand to a new PO.

Case law sets forth when an ex parte communication is so egregious as to undermine fundamental notions of due process and fairness. In *Freeman Engineering Associates v. Federal Communications Commission (FCC)*, 103 F.3d 169, 184 (D.C. Cir. 1997), the Court cited to several factors that should inform this analysis, including:

> The gravity of the ex parte communication; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

See also PATCO v. FRLA, 685 F.2d 547, 565 (D.C. Cir. 1982).

Before evaluating the effect of the ex parte communication in this instance, we must first address whether the person responsible for the communication – here the Bear Faction – qualifies as a party to this administrative action, and, if it does not, whether it qualifies as an interested party for purposes of our analysis. We conclude that the Bear Faction, while not a party to this action, is an interested party.

In the *PATCO* case, the Court discussed the application of the APA rule on ex parte communications:

> The APA, 5 U.S.C. 557(d), applies only to ex parte communications to or from an interested person. The term interested person is intended to be a wide, inclusive term covering any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The interest need not be monetary, nor need a person be party to, or intervenor in, the agency proceeding to come under this section. The term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. The term does not include a member of the public at large who makes a causal or general expression of opinion about a pending proceeding.

Id.

Homer Bear, Jr., was a named Respondent in the NOV and TCO. Although he was served with the NOV and TCO, he elected not to participate in the administrative proceeding. He chose neither to appeal the NOV or the TCO. However, although the Bear Faction was not a formal party to the administrative proceeding, this does not prevent our conclusion that the Bear Faction is an interested party. As the dissident tribal faction responsible for ousting the tribal government recognized by the DOI, it was the Bear Faction's actions that were the focus of the allegations against the Tribe in the NOV and the bases for the TCO. Further, any possibility of a successful settlement depended on participation by the Bear Faction. Their actions could help resolve the dispute and lead to dissolution of the TCO, or their actions could perpetuate the conflict, resulting in permanent closure of the gaming facility. The Bear Faction is undoubtedly an interested party.

We next address whether the communication irrevocably tainted the decision-making process so as to make the ultimate judgment of the agency unfair. We look to the checklist of factors utilized by the *PATCO* Court.

(1) **The gravity of the ex parte communication**

The ex parte communication was made in response to a notice sent by the PO to the Chairman, the Walker Council and the Bear Faction exploring whether the matter could be resolved through settlement or alternative dispute resolution. On July 22, 2003, the Bear Faction, by its attorney, Steven Olson, Esq., sent a letter to the PO in response to his inquiry to the parties about the possibility of settling

the dispute. Attached to the Olson letter was a copy of a July 16, 2003, letter from Homer Bear, Jr., to Alex Walker, Jr.

The Olson Letter was directed at settlement. He informed the PO that mediation was unlikely to resolve the issue. He argued that it was the Walker Council's intransigence that doomed the mediation. The attached Bear Letter was arguably more egregious. It is replete with disparaging accusations and remarks regarding Alex Walker Jr. and his administration. However, the PO stated in his August 15, 2003 letter, in which he advises the parties of the ex parte communication, that he considered the letter "only in the context of one of the parties' responses concerning settlement, which all agreed was unlikely." August 15, 2003 letter at 2. He further states that "[t]he July 22 Olson letter and attachment were not cited or relied on in any manner as the basis for any findings or conclusions in the Recommended Decision." *Id.*

We accept at face value the statements of the PO that he did not cite or rely on the ex parte communication. His assertions are entirely plausible. The letters were sent to the PO in response to an inquiry that he had initiated regarding possible settlement, not in response to one of the earlier, more substantive aspects of the proceedings, i.e. the NOV, TCO or written submissions by either party. The only mention of the ex parte letters by the PO in his Recommended Decision is at the beginning of the Decision, in a section entitled "Proceedings," in which the procedural posture of the matter is summarized. (Recommended Decision at 2). He concludes by discussing how he reached out to "the NIGC, Tribe and the Bear faction," regarding possible settlement, and

how "all responded that mediation had been attempted unsuccessfully ... and that such further efforts were not likely to be successful at this point." (*Id.*). We accept the PO's assertion that he did not consider the ex parte letters.

(2) Whether the contacts may have influenced the agency's ultimate decision

The ultimate decision we reach here is to make permanent the TCO. As we find herein, the only issue on appeal was the appropriateness of closure as the sanction for the conceded violations. Neither the Olson Letter nor the Bear Letter touches on this specific issue. The Bear Letter does include the statement that, "the vast majority of the Tribe has repeatedly recognized that a Council headed by Homer Bear, Jr. is the true leadership of the Tribe." (Bear Letter at 3). This claim is supported with a detailed report of a recent tribal election in which "a record number of voters went to the polls and in which the Bear Faction's members received 97-98% of the vote, while members of the former Walker Council received just 2-3% of the vote." (Bear Letter at 1).

Our decision rests on our recognition of the Walker Council as the legitimate leaders of the Tribe, based on continuing federal recognition by the DOI of the Walker Council as the tribal leaders and our historic deference to the DOI on these matters. Therefore, any arguments to the contrary, set forth in the letters which comprise the ex parte communication, have not influenced our decision.

(3) Whether the party making the improper contacts benefited from the agency's ultimate decision

As stated above, the ultimate decision we reach here is to make permanent the TCO. The Casino will remain closed. The Tribe will not reap the benefits of Indian gaming unless and until the TCO is rescinded. We cannot fathom how this result could benefit the Bear Faction. Furthermore, our decision is based on acknowledgement of the Walker Council as the federally recognized government of the Tribe, which is contrary to the content of the Bear Faction's ex parte communication.

(4) Whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond

Although the contents of the Bear Letter were known to the Walker Council, it was clearly not known that the attorney for the Bear Faction, Steven Olson, had sent a copy of this letter to the PO, along with his own letter of July 22. Consequently, the only two parties, the Walker Council and the NIGC, were not given notice that both letters had been sent to the PO, and they were thereby deprived of their ability to respond to the letters, which were submitted to the PO several days after the record had been closed by the PO.

(5) Whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose

We do not believe that remand for new proceedings would serve a useful purpose. As discussed

above, the PO has stated that the ex parte communication was not cited or relied on in any manner as the basis for any findings or conclusions in the Recommended Decision. Furthermore, the current record is sufficient for the Commission to decide the sole issue raised on appeal, based on the parties' written submissions, as they requested. Therefore, to remand the proceedings to a new PO would serve no purpose.

IV. The Commission Rejects in its Entirety the PO's Recommended Decision Because the PO Exceeded the Scope of Review When He Addressed Issues Not Raised on Appeal, and Did Not Address the Merits of the Issues Raised on Appeal.

Both parties to this appeal, the Chairman and the Walker Council, argued in their filed objections to the Recommended Decision that the PO exceeded the scope of review when he made findings of fact and conclusions of law based on the underlying violations and bases for closure, which the Walker Council had not appealed. We agree, and, therefore, reject the Recommended Decision in its entirety.

Both the Walker Council and the Bear Faction were identified as respondents in both the NOV and the TCO.[8] The Bear Faction appealed neither the

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[8] The General Manager is also identified as a respondent in the TCO, presumably because the TCO orders closure of the Casino and the General Manager is in charge of the day-to-day operations of the Casino. Nevertheless, the General Manager did not appeal the TCO.

NOV nor the TCO.[9] Therefore, the Bear Faction waived its right to contest the NOV and the TCO.

The Walker Council did not appeal the NOV, but did appeal the TCO. The Walker Council's pleadings clearly establish that the Walker Council, as the federally recognized leadership of the Tribe, admitted the violations and the underlying facts alleged in the NOV and Temporary Closure Order. In its Supplemental Statement, the Walker Council stated, "The Tribe and its federally recognized Tribal Council are not in control of the Tribe's governmental offices or gaming operations, or the revenues generated ...thereby resulting in a violation of the [IGRA]." (Supplemental Statement in Support of Appeal from Order of Temporary Closure at 1). The Walker Council further stated that "the Tribe and its federally recognized Tribal Council acknowledge the circumstances in the NOV..." (*Id.* at 2). We understand this to mean that the Tribe, by its federally recognized tribal leadership, does not contest the facts upon which the NOV or TCO were based.

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[9] We have considered whether the Bear Faction's May 2 letter evidences an intent to appeal the NOV, and find that it does not. While it does respond to the allegations in the NOV, it does not comply with the other requirements of the NIGC regulation governing appeals. 25 CFR § 577.3(a) provides that a respondent may request a hearing by submitting a notice of appeal, and Section 577.3(c) provides that a respondent may instead waive its right in writing to an oral hearing and instead elect to have the matter determined solely on the basis of written submissions. The Bear Faction has done neither. We also note that in its ex parte communication to the PO, the Bear Faction specifically states that it made a strategic decision not to appeal. *See* July 22, 2003, letter from Steven Olson, Esq., attorney for the Bear Faction, to the PO.

The NIGC regulations provide that a respondent may request a hearing to contest whether an order of temporary closure issued by the Chairman should be made permanent or be dissolved by submitting a notice of appeal. 25 C.F.R. § 577.3(a). After such notice is filed, the respondent must file with the Commission a supplemental statement that states "with particularity the relief desired and the grounds therefor..." 25 C.F.R. § 577.3(c). At the hearing, a respondent has the option of presenting oral testimony or witnesses. *Id.* However, in lieu of an oral hearing, the NIGC regulations provide that the respondent may elect to have the merits of the appeal determined "solely on the basis of written submission." *Id.*

The Walker Council waived its right to have a hearing, including presenting testimony and witnesses, and instead elected to have the merits of the appeal of the TCO decided solely on the basis of written submissions. Importantly, in its written submissions, the Walker Council did not dispute the violations alleged as the basis for the TCO or the facts that gave rise to those violations. Through its written submissions, the Walker Council narrowed the issues it could have appealed to only one—the appropriateness of the sanction imposed by the Chairman, closure of the Casino.

Such a narrowing of the issues on appeal is permissible, even in situations where an administrative agency is required to hold a trial-type evidentiary hearing (unlike here, where an evidentiary hearing is optional). In *Persian Gulf Outward Freight Conference v. Federal Maritime Commission*, 375 F.2d 335 (D.C. Cir. 1967), the petitioner sought review of a final order of the Federal Maritime Commission

directing the petitioner to cease and desist from carrying cargo at certain tariff rates found to be outside of an approved agreement. The D.C. Court of Appeals found that an agency could decide an appeal on a memorandum of law and need not provide an evidentiary hearing, where the petitioner (the Persian Gulf Conference) was afforded an opportunity to demonstrate what facts it felt were material to the issue before the agency (the Federal Maritime Commission). The Court discussed its reasoning, stating:

> It is fundamental to the law that the submission of evidence is not required to characterize "a full hearing" where such evidence is immaterial to the issue to be decided. The Supreme Court has defined a full hearing as one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law of the step asked to be taken. Where no genuine or material issue of fact is presented[,] the court or administrative body may pass upon the issues of law after according the parties the right of argument.

Id. at 341.

The Respondent Walker Council, on behalf of the Tribe, narrowed the issues in its written submissions to whether closure was the appropriate sanction. The PO chose to ignore this narrowing of the issues by the only Respondent appealing, the Tribe and the Walker Council, and instead made recommended findings of fact and conclusions of law with respect to the underlying violations, consideration of which had been waived by the Bear Faction when it did not appeal, and which were agreed to by the Walker

Council as part of its appeal. We must, therefore, reject the PO's decision in its entirety and now consider and decide the sole issue raised by the parties on appeal, i.e. whether the Chairman's temporary closure of the Casino was appropriate. In deciding this issue, we rely on the closed record and the written submissions of the parties, as they agreed.

V. To Determine Whether Closure of the Casino or a Civil Fine is the Appropriate Sanction, We Must First Determine Which Group Can Lawfully Act on Behalf of the Tribe and Correct the Violation.

Before we can assess the appropriateness of the Chairman's sanction—closure of the Casino—we must first determine who is ultimately responsible for gaming, and, therefore, ultimately responsible for correcting the gaming violations. A sanction would be inappropriate if levied against one who has no power to correct the violations forming the basis for the sanction.

In this case, the violations were directed to the Tribe. The Chairman noticed both Alex Walker, Chairman of the elected Council of the Tribe, and Homer Bear, nominal Chairman of the dissident group that had assumed control of the leadership of the Tribe and the operation of the Casino. Despite the fact that both of these individuals were noticed, the Tribe is the entity with authority to game under the IGRA. *See* 25 U.S.C. §§ 2710(b)(1)(B), (d)(1)(A)(i), (d)(2)(A)-(C). Thus, the Tribe is ultimately responsible for correcting the violations.

The Tribe acts through its governing body. Pursuant to the Tribe's Constitution, a Tribal Council is the governing body of the Tribe. (Article III, Section

1). The Tribal Council is to have authority to represent the Tribe in all matters pertaining to the business of the Tribe. (Article III, Sec. 2). The Tribal Council shall consist of seven members elected at large from members of the Tribe. (Article IV, Section 1).

The Tribe has both the ability and the power to correct the uncontested gaming violations. This can be accomplished by adherence to both the Tribe's Constitution and its Gaming Ordinance.

VI. We Defer to the Secretary of the Interior's Determination as to the Recognized Tribal Leadership. The Secretary Recognizes the Walker Council. The Walker Council is not in Control of the Tribal Government or the Tribe's Gaming Operation.

For a tribe to lawfully conduct gaming on its lands, the tribe must be "recognized as eligible by the Secretary [of the Interior] for the special programs and services provided by the United States to Indians because of their status as Indians" and must be "recognized as possessing powers of self-government." 25 U.S.C. § 2703(5). The Commission defers to the Secretary of the Interior's determination of whom the Secretary recognizes as the legitimate tribal leadership of a tribe. As we have stated in a prior Commission Decision:

> [T]he plain meaning of the [IGRA] establishes that only tribes recognized by the Secretary, acting through their designated representatives, may engage in Indian gaming. It follows that the Secretary, as the expert on such matters, would be the authority to determine who acts on behalf of the recognized tribe.

Decision Letter, Tuscarora Tribal Business Council, July 19, 1994, at 5-6 (AR# 23).

This Commission Decision sets forth a thorough legal analysis of why the Chairman should defer to the Secretary, why IGRA implies that the Chairman should rely on the Secretary for guidance on what group constitutes the governing body of a tribe, and why the Chairman's deference to the Secretary prevents the chaos caused when different federal agencies recognize different governing bodies of the same tribe. We find it unnecessary to reiterate that analysis here.[10]

We agree with the Walker Council that, for the NIGC to ensure that the "governing body of the Indian tribe" is responsible for the gaming activity, the NIGC necessarily must know what entity to recognize as the governing body of the Tribe. Such recognition, as well as federal recognition of a tribe itself, is evidenced by a government-to-government relationship between the United States (through its executive branch officials) and the Tribe (through its governing body)." (Tribal Respondents' Objections to Recommended Decision, at 14).

We find that the Walker Council is the group that can lawfully act on behalf of the Tribe and correct the bases for closure, and in so finding, we deferred to the Secretary of the Interior's determination that the Walker Council is the recognized tribal leader-

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[10] We share the Walker council's concern, articulated in its Tribal Respondents' Objections to Recommended Decision, at 16, that the PO reached a contrary conclusion without even referencing this binding agency precedent.

ship. The recognized leadership is not currently in control of the Casino or its regulation.

VII. Because the Recognized Tribal Leadership is not in Control, the Gaming is in Effect Unregulated.

The Walker Council argues that closure of the Casino has "only halted an unauthorized group of dissidents from conducting gaming activity at the Meskwaki Settlement and has not stopped the other IGRA violations noted..." (Tribal Respondents' Objections to Recommended Decision at 18-19). The Walker Council argues that the more appropriate sanction is a fine against Homer Bear. We disagree.

Merely fining the unrecognized faction, while allowing gaming to continue, does not address the critical issue: that Indian gaming under the IGRA must be operated by the Tribe and by the tribal leadership recognized by the Secretary. We cannot allow an unrecognized, dissident faction to operate an Indian casino.

We recognize, as the Chairman did, that the Walker Council does not control the Bear Faction's actions. However, as the Chairman has stated, "When the federally recognized leadership is not in control of the gaming operation, the activity being conducted is not Indian gaming under the IGRA. I cannot allow such gaming to continue." (Decision Upon Expedited Review, at 3). We agree. Neither can we.

Our decision is supported by the 8th Circuit Court of Appeals, in a case directly related to this one. When the Casino did not close pursuant to the TCO, the Chairman of the NIGC sought federal

court enforcement of the TCO in the United States District Court for the Northern District of Iowa. The Court granted a preliminary injunction enforcing the TCO, and on May 23, 2003, U.S. Marshals closed the Casino. *In re: Sac & Fox Tribe* at *13. On appeal, the 8th Circuit affirmed the district court's grant of the preliminary injunction. The 8th Circuit noted, in its analysis of whether the public interest favored enforcement of the TCO, that

> [p]rior to enforcement of the closure order in this case, gaming operations had become, effectively, unregulated. The BIA did not recognize the [Bear Faction], yet the [Bear Faction] had appropriated control of the gaming operations and diverted tribal assets into new bank accounts. As such, it was no longer possible for the NIGC to ensure that the tribe was the primary beneficiary of the gaming operation....

Id. at *32.

VIII. We Find that Closure of the Casino is Based on Substantial, Uncontested Violations and is the Only Appropriate Remedy, and, Therefore, Make Permanent the Order of Temporary Closure.

The "IGRA grants the Chairman broad authority to fashion remedies to cure perceived gaming violations, including the authority to order temporary closures." *Id.* at 21, citing 25 U.S.C. § 2713(b)(1). The Chairman may issue an order of temporary closure if one or more substantial violations exist. 25 C.F.R. § 573.6(a). NIGC regulations set forth 12 substantial violations that may, individually, form the basis for closure. Each of the three violations set forth in the TCO and conceded by the Walker Council may, indi-

vidually, form the basis for closure, as each is a "substantial violation" as defined by NIGC regulations. The Commission has the power to, "by an affirmative vote of not less than 2 members and after a full hearing,[11] make permanent a temporary order of the Chairman closing a gaming activity..." 25 U.S.C. § 2706(a)(5).

The Tribe, through its elected council—the Walker Council—argues that closure will not cure the violations, and instead seeks a civil fine against the dissident faction in an attempt to coerce compliance. It argues that the violations are the result of the actions of the Bear Faction and that correcting the violations can only be accomplished by the actions of the Bear Faction. We disagree. The alternate remedy of a civil fine, proposed by the Walker Council, does not persuade us. We find that closure is the only appropriate remedy, and we make permanent the TCO.

The Tribe is ultimately responsible for its gaming operation. In this case, a break down in the governmental structure of the Tribe led to a government takeover by a dissident faction. That faction then assumed control of the Casino.

The Tribal Council, chaired by Respondent Walker, is the government of the Tribe that is federally recognized by the Secretary of the Interior. The Tribe and its federally recognized Tribal Council are not in control of the Tribe's governmental offices or gaming operation. The exclusion of the federally rec-

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[11] As addressed above, Respondent Walker Council waived the hearing.

ognized leadership from control over operations of the gaming facility led to three substantial violations of the IGRA, NIGC regulations, and the Tribe's Gaming Ordinance. The Tribe, through its Council, the Walker Council, admits that those substantial violations occurred.

We agree with the Chairman that, "allowing a gaming operation to remain open while an unrecognized faction has control would encourage unlawful takeovers of Indian gaming establishments creating a situation that is inimical to stable tribal governments and their gaming operations." (Chairman's Reply to Respondents' Supplemental Statement at 4-5).

Under the circumstances presented here, closure is not only the best remedy; it is the only practical remedy when an unrecognized faction has illegally taken over the tribal government and its gaming operation. We recognize that closure of the Casino has negatively impacted the Tribe, Casino employees and the surrounding community. We do not reach our decision to close the Casino in haste or without serious consideration. We do believe, however, that closure is the only appropriate remedy in a situation where control of the Casino has been wrested from the Tribe and its legitimate tribal government. We trust that, in the end, our decision will serve to strengthen not only the government of this Tribe, but will strengthen all tribal governments.

Gaming may resume upon a petition by the Tribe to rescind the Closure Order, if the Commission is convinced, following a visit by a designated NIGC employee(s), that the Tribe, acting through a duly elected, federally recognized Tribal Council, is in

control of the Tribe and Casino, and that no violations of the IGRA, NIGC regulations or the Tribe's Gaming Ordinance exist.

It is so ordered by the NATIONAL INDIAN GAMING COMMISSION.

/s/
Phillip N. Hogen
Chairman

/s/
Nelson Westrin
Commissioner

/s/
Cloyce Choney
Commissioner

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Midwest Regional Office
Bishop Henry Whipple Federal Building
One Federal Plaza, Room 550
Ft. Snelling, MN 55311

RECEIVED
March 17, 2003
Sac & Fox Tribe of Iowa
Executive Management Office

Mr. Homer Bear, Jr.
3545 Gg Avenue
Tama, Iowa 52339

Dear Mr. Bear:

We are in receipt of your March 13, 2003 letter regarding the leadership of the Sac and Fox Tribe of the Mississippi in Iowa (Tribe) and recognition of a new tribal council.

We have reviewed your letter and the Constitution and Bylaws of the Sac and Fox Tribe of the Mississippi in Iowa (Constitution). Referendum and Recall are addressed in Article XII of the Constitution and settling of disputes among tribal members as addressed in Article X, Section 4(m). There are no provisions in either of these constitutional citations for the BIA to intervene in those tribal process nor is there an appeal to the BIA.

On December 11, 1995, the Interior Board of Indian Appeals (BIA) ruled, "..., the Board, as a sovereign nation, has not only the right, but also the responsibility to resolve this dispute for itself, without

further interference from BIA. As long as the Band's final resolution does not conflict with the governing documents or the Indian Civil Rights Act, 25 U.S.C. § 1302, BIA must defer to the Band's resolution of this intra-tribal dispute." (*See* Darrell Wadena, Tony Wadena, Jerry Rawley, Paul Williams, Rick Clark, and Doyle Turner vs. Acting Minneapolis Area Director, (IBIA 96-99-A) (Copy enclosed.) Therefore, the BIA lacks authority to involve itself in these matters.

By copy of this response, we are forwarding your letter and attachments to the governing body of the Tribe. We would be remiss in preserving our government-to-government relationship with the Tribe if we didn't inform them of the concerns raised in your letter.

If you have any questions, please contact De Springer, Regional Tribal Operations Officer, at (512) 713-4400, ext. 1125.

Sincerely,

Regional Director

cc: Alex Walker, Chairman, Sac & Fox Tribe of the Mississippi in Iowa (w/copy of incoming)

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240

April 1, 2003

The Honorable Leonard Boswell
House of Representatives
Washington, DC 20515

Dear Mr. Boswell:

This letter is to confirm the telephone conversation that you had yesterday with my Chief of Staff, Jerry Gidner, regarding who the Department of the Interior recognizes as the leadership of the Sac & Fox Tribe of Mississippi in Iowa. The Department continues to recognize the elected Tribal Council led by Alex Walker, Jr., as the leadership of the Tribe.

Should you need any additional guidance on this matter, please contact Mr. Gidner at (202) 208-7163.

Sincerely,

/s/
Acting Assistant Secretary—
Indian Affairs

cc: Michael Smith, Director, Office of Tribal Services
Larry Morrin, Director, Midwest Region

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

MAY 9, 2003

Tribal Government Services
BCCO 03597 & 03622

Mr. Homer Bear, Jr.
349 Meskwaki Road
Tama, Iowa 52339-9629

Dear Mr. Bear:

This is in response to your April 3 and 18, 2003, letters requesting that the Department of the Interior adhere to its policy of noninterference into the internal affairs of the Sac & Fox Tribe of the Mississippi in Iowa (Tribe).

Although we agree that the Department's position of refraining from intervening into a tribe's internal affairs regarding the selection or removal of its leaders is appropriate, we note that the current impasse between the groups competing for leadership within the Tribe is nearly two months old. We urge the parties to continue to work in good faith to resolve differences.

By letter of March 14, 2003, the Regional Director of the Midwest Regional Office informed you that there had been no change in the Bureau of Indian Affairs' recognition of elected officials of the Tribe. In addition, by letter dated April 1, from the Acting Assistant Secretary—Indian Affairs to Congressman

Leonard Boswell, he stated that "[t]he Department continues to recognize the elected Tribal Council led by Alex Walker, Jr., as the leadership of the Tribe." The Bureau of Indian Affairs continues to recognize Mr. Alex Walker, Jr., as the elected Chief of the Council, and the other elected representatives to the Council as well.

Should you have any questions or further concerns regarding this matter, you should contact Mr. Larry Morrin, Regional Director, Midwest Regional Office, Bureau of Indian Affairs, One Federal Drive, Room 50, Fort Snelling, MN 55111-4007.

Sincerely,

/s/
Deputy Commissioner of Indian Affairs

cc: Regional Director, Midwest Region
Chairman, National Indian Gaming Commission

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

May 23, 2003

Homer Bear
349 Meskwaki Road
Tama, Iowa 52339-9629

Dear Mr. Bear:

I have just received, presumably at your direction, a copy of a certification of the results of a special election held May 22, 2003. I have also received various letters from you and from you legal counsel concerning this selection.

The Department's position is that it will not recognize any election that is not held in strict compliance with tribal law. Our position is that the May 22 special election was not called and held in accordance with tribal law and, therefore, we will not recognize the results of it.

Sincerely,

/s/
Aurene M. Martin
Acting Assistant Secretary—
Indian Affairs

cc:

Steven F. Olson, Esq.
Bluedog, Olson & Small

Southgate Office Plaza
5001 West 80th Street, Suite 500
Bloomington, MN 55437
Alex Walker, Chairman
Sac & Fox Tribe of the Mississippi in Iowa
349 Meskwaki Road
Tama, IA 52339-9629

Philip N. Hogen
Chairman, National Indian Gaming Commission

BEFORE THE COURT OF THE SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA

Sac and Fox Tribe of the Mississippi in Iowa
Plaintiff,

v.

Attorney's Process and Investigation Services, Inc.
Defendant

CASE NO. API-CV-Damages-2005-01

COMPLAINT

Plaintiff, Sac and Fox Tribe of the Mississippi in Iowa, for its complaint against Defendant, states and allege as follows:

JURISDICTION

1. This Court has subject matter jurisdiction in this matter pursuant to Sac and Fox Tribe of the Mississippi in Iowa Code section 5-4101 and has personal jurisdiction over defendant under Sac & Fox Tribe of the Mississippi in Iowa Code section 5-4102(2-8) because the cause of this action arose within the jurisdiction of the Tribe, because the Tribe brings this suit to cause Defendant to return funds to the Tribe which Defendant unlawfully has taken and retained, and because defendant committed torts against the Tribe and harm to tribal real property and to other tribal property on the Settlement.

PARTIES

2. The Sac and Fox Tribe of the Mississippi in Iowa (the Tribe) is a federally recognized Indian Tribe, which is governed by a Tribal Council comprising seven members of the Tribe. The Tribe owns and operates the Meskwaki Bingo Casino Hotel (the Casino).

3. Defendant is a corporation organized and existing under the laws of the State of Wisconsin.

FACTS

4. Between approximately June and October, 2003, Defendant took possession of approximately $1,022,171.26 in tribal funds.

5. The Tribe's governing body did not authorize the payment of tribal funds to Defendant.

6. On or about February 6, 2004, the Tribe demanded return of the funds which Defendant had taken. Defendant did not return any tribal funds.

7. On or about October 1, 2003, Defendant intentionally entered and remained at the Tribe's Community Center (which houses the Tribe's executive offices and records) and the Casino. Such entering and remaining was not authorized by the Tribe.

8. Defendant's entry of the Casino on October 1, 2003 constituted an intentional violation of the implementing order issued on May 22, 2003 in United States of America v. Alex Walker, Jr. (N.D. Iowa case no. 03-52-LRR). The Tribe did not and could not consent to defendants entering or remaining in violation of that Court order.

9. While entering and remaining on the Tribe's property on October 1, 2003, Defendant intentionally damaged and destroyed the tribal property.

10. The reasonable cost to the Tribe to replace and repair the property which was damaged or destroyed by Defendant on October 1, 2003 was no less than $7,035.00.

11. While entering and remaining on the Tribe's property on October 1, 2003, Defendant obtained and exercised control over all or nearly all tribal gaming information and tribal gaming commission information, including but not limited to detailed compiled tribal gaming financial information, information regarding the extent and scope of tribal security and surveillance coverage, information regarding ongoing gaming commission investigations, all personnel files, all legal files, and devices used to insure the integrity of the Casino's operation (hereinafter confidential property).

12. The confidential property contains detailed information regarding: patrons (including comps provided to patrons, amounts and patterns of patron betting, contact information and other information); employees (including contract terms, rates of pay, benefits, bonuses, disciplinary actions, medical information, and other personal information); and general casino business (including detailed market analysis, strategic goals and plans, detailed and itemized budgets, and other information).

13. On October 1, 2003 and at all times since then, tribal gaming statutory laws and regulations and tribal common law required that the confidential property was to be kept confidential. Those laws furthered the integrity and security of the Casino

operations and the security and safety of the Casino's patrons and employees and were enacted for gaming regulatory purposes.

14. Access to the confidential property was, on October 1, 2003, restricted to certain individuals, on a need-to-know basis.

15. The confidential property had been stored in secured areas of the Casino. Defendant was able to gain access to the property only by criminally breaking into and entering the secured areas of the Casino and by the threat to use armed force and by the use of other force.

16. The confidential property was protected from disclosure by confidentiality agreements and confidentiality policies.

17. The Tribe had taken steps which were reasonable under the circumstances to keep the confidential property confidential.

18. On October 1, 2003, the confidential property had independent financial value to the Tribe because it was not generally known to, nor readily ascertainable by proper means by, persons who could obtain economic value from its disclosure or use.

19. The Tribe would be damaged if its confidential property were released or disclosed to the public.

20. One of the reasons the Tribe strenuously protects the confidential property is that public dissemination would be expected to increase the risk of criminal activity against the Tribe (including its Casino) and/or members of the Tribe.

21. Increased criminal activity would erode public confidence in the Casino's operations, and ad-

versely affect the Tribe, its members, and its employees.

22. The mere possibility that the Casino's record of integrity in the operation of gaming could be tarnished by increased criminal activity could result in the loss of the public's goodwill.

23. Upon information and believe, the confidential property had and has independent economic value to organized crime or other corrupting influences.

24. At the time Defendant broke into the Casino, they were accompanied by James DeMasseo and Charlie Troy, people who had been banned from the Casino for previous gross violations of tribal gaming laws. Defendant assisted DeMasseo's and Troy's access to confidential information. Confidential information included files related to DeMasseo's prior break-in of the Gaming Commission offices and evidence which DeMasseo had left behind when he had been removed from the Casino.

25. The confidential information had substantial value to DeMasseo.

26. At the time Defendant broke into the Tribe's Community Center and Casino, it was accompanied by Fred Dorr, who was then adverse to the Tribe and the Gaming Commission. Defendant assisted Dorr and others associated with him to gain access to confidential information. Confidential information included attorney-client privileged information in matters where Dorr was representing parties who were litigating against the Tribe.

27. The confidential information had substantial value to Dorr and his clients.

28. The Casino is in direct competition with other gaming operations in Iowa and surrounding states.

29. The confidential information had substantial value to competing gaming operations.

30. The Casino uses the services of numerous contractors, hired both by bid processes and non-bid processes.

31. The confidential information had substantial value to those with current contracts with the Tribe and to those who might seek to contract with the Tribe in the future.

32. Defendant's October 1, 2003 break-in at the Casino and Community Center was a premeditated and coordinated act in which Defendant used approximately 30 enforcers. Some of those enforcers were armed with batons and one or more was armed with a firearm, and those enforcers committed unlawful assaults and batteries and false imprisonments against tribal members and employees and wrongly restricted the movement of tribal members and employees.

33. When Defendant broke into the Tribe's Community Center and Casino at or about 6:00 a.m. on October 1, 2003, it knew that there were tribal members and employees in both locations.

34. Neither on October 1, 2003 nor at any other time has Defendant applied for or held a license issued by the Sac and Fox Gaming Commission, and Defendant is not fit to hold a gaming license.

COUNT 1
(TRESPASS TO LAND)

35. The Tribe repeats and alleges paragraphs 1-xx herein.

36. Defendant's entry of the Meskwaki Bingo Casino Hotel and the Sac & Fox Tribe of the Mississippi in Iowa Community Center on October 1, 2003 constitute trespass to land.

37. As a direct and proximate result of this conduct, the Tribe has been damaged in an amount to be determined at trial.

COUNT II
(TRESPASS TO CHATTEL)

38. The Tribe repeats and alleges paragraphs 1-xx herein.

39. Defendant's use and review of non-real property of the Sac & Fox Tribe of the Mississippi in Iowa and its Casino on October 1, 2003 constitute trespass to chattel, including trade secret property interests.

40. As a direct and proximate result of this conduct, the Tribe has been damaged in an amount to be determined at trial.

COUNT III
(THEFT (CONVERSION) OF TRIBAL FUNDS)

41. The Tribe repeats and alleges paragraphs 1-xx herein.

42. At the times that Defendant took payments from the Tribe, Defendant converted tribal funds to its own use.

43. As a direct and proximate result of this conduct, the Tribe has been damaged in an amount, not less than $1,022,171.26, to be determined at trial.

COUNT IV
(MISAPPROPRIATION (CONVERSION) OF TRADE SECRETS)

44. The Tribe repeats and alleges paragraphs 1-xx herein.

45. Defendant unlawfully gained access to tribal trade secret information and provided tribal trade secret information to others.

46. As a direct and proximate result of this conduct, the Tribe has been damaged in an amount to be determined at trial.

PUNITIVE DAMAGES

47. No later than February 6, 2004, Defendant knew that its failure to return tribal funds caused injury to the Tribe, but Defendant deliberately acted in conscious or intentional disregard or indifference to the injury of the Tribe.

48. On October 1, 2003, Defendant knew that it lacked the authority to enter or remain at the Tribe's Community Center, Casino or Gaming Commission offices.

49. On or about October 1, 2003, Defendant knew that it lacked authority to damage, destroy, or inspect the Tribe's confidential information.

50. Entering the Casino and Community Center with a sizable force of armed enforcers at approximately 6:00 a.m., knowing that tribal members and employees were in those buildings, demon-

strated conscious or intentional disregard to the rights or safety of the Tribe and the members and employees at those locations.

51. Committing assaults and batteries and false imprisonments on tribal members and employees on October 1, 2003 demonstrates conscious or intentional disregard to the rights or safety of the Tribe and the members and employees at the Casino and Community Center.

52. Permitting James DeMasseo access to secured areas of the Casino and Gaming Commission offices, from which he had been permanently banned for the prior break-ins at the Gaming Commission demonstrates conscious or intentional disregard to the rights of the Tribe, including its Gaming Commission and its Casino.

53. A substantial award of punitive damages to the Tribe is warranted in this case.

WHEREFORE, the Tribe respectfully requests that the Court award them the following relief:

1. Damages or reimbursement in an amount to be proven at trial;

2. Punitive damages;

3. All costs and disbursements; and

4. Such other and further relief as the Court may deem just and equitable or to which the Tribe may be entitled by operation of law based on the facts presented at trial.

Dated: August 3, 2005

/s/
OLSON, ALLEN & RASMUSSEN, L.L.C.

Steven F. Olson, Esq.
Jeffrey S. Rasmussen, Esq.
8200 Humboldt Ave. S
Bloomington, MN 55431
Phone: (952) 881-3069
Facsimile: (952) 881-6171
ATTORNEYS FOR THE SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA

AGREEMENT

This Agreement is made and entered into this 16th day of June, 2003, in Green Bay, Wisconsin, between the Sac & Tribe of the Mississippi in Iowa ("Tribe"), located at 349 Meskwaki Road, Tama, Iowa, and Attorney's Process and Investigation Services, Inc. ("API"), a Wisconsin corporation, located at 205 Doty Street, Suite 203, Green Bay, Wisconsin.

WITNESSETH

WHEREAS, the Tribe desires to engage API Investigation, security and law enforcement consulting services; and

WHEREAS, API is capable of performing the services needed by the Tribe;

NOW, THEREFORE, for good and valuable consideration, the parties agree as follows:

SECTION I – PROVISIONS

1. RETENTION OF API

The Tribe hereby retains API to perform the services outlined within this Agreement on the terms and conditions as set forth herein. Specific requests for services, their mode, and time of delivery shall be made, in writing, by the Tribe or its designee from time to time to API. The Tribe has designated Kirby Jock, Executive of the Tribe, as its designee to interface and coordinate to API's services. Both parties understand and agree that API becomes an agent of the Government of the Tribe to the extent necessary to perform its obligations under this Agreement.

2. SERVICES

API shall perform services directly relating to the investigation of a takeover by dissidents at the Tribe's facility located on the Tribe's reservation lands.

Services shall include, but not be limited to, the following:

A. Investigation of individuals involved in the unlawful acts against Tribal Government.

B. Developing a security plan for the re-opening of the Tribe's Gaming Facility.

C. Research the feasibility of establishing Tribal police powers and assisting in the training and deployment of same if feasible.

D. Provide general community security services to Tribal Government and its operations as is feasible.

E. Investigate allegations of unlawful acts and tribal policy violations of the dissident group involving Tribal funds, and gaming operations.

F. Assist in general security matters as directed by the Tribal government.

3. TERM AND RENEWAL

The initial term shall be for 180 days and shall automatically renew for an additional 180 days unless 30 days prior written notice is given by other party indicating a desire to terminate this Agreement at the end of the initial or any renewal period.

4. FORCE MAJEURE

No party hereto shall be liable or be in breach of any provision of the Agreement for any failure or de-

lay in performing any obligation hereof if such failure or delay is due to fire, flood, acts of God, war, Federal or State governmental order or any other cause which is beyond the reasonable control of such party; provided, however, that such party so hindered shall promptly give notice to the other party of such occurrence and shall take necessary actions to eliminate the effects thereof to the extent possible. Nothing in this paragraph shall mean that the Tribe may excuse its own performance on the basis of an art of the Tribal Government.

5. CONFIDENTIALITY OF AGREEMENT

All provisions of this Agreement shall be held in confidence except as may be required under Federal, State, and Tribal law, regulations or ordinances; provided, however, that API may disclose any or all provisions to its bank and legal counsel, its accounting firm, its insurer, or its attorneys if requested to do so by such entities. However, API shall not under any circumstances disclose any work generated under this Agreement or any communications relating to this Agreement other than the Agreement itself without express permission of the Tribe. API shall make no other disclosure regarding the existence or contents of this Agreement unless it first notifies the Tribe and allows the Tribe thirty (30) days to object to such disclosure. Such disclosure shall not be made if the Tribe objects within the thirty (30) day time period.

6. CONFIDENTIALITY AND OWNERSHIP OF WORK PRODUCT

The parties acknowledge that the services rendered by API under this Agreement are at the direction of the Tribe and all information, materials, re-

ports, written documentation and other work product of API of any kind produced under this Agreement are the property of the Tribe.

API shall not disclose to any third party any of the information generated hereunder, except as may be required by Federal, State or Tribal laws or regulations or other lawful order, provided that API shall notify the Tribe prior to making such disclosure and the Tribe shall have fifteen (15) days to object to the disclosure.

7. EMPLOYMENT RESTRICTIONS

The Tribe agrees that it will not, during the term of the Agreement or within 120 days of termination, hire or retain any API employee(s) or any subcontractor(s) hired, engaged and/or utilized by API in performing the services set forth in this Agreement. The parties contemplate that the Tribe may pay compensation for such consent.

8. SUBCONTRACTORS

API is authorized to retain subcontractors as, within its business judgment, it deems necessary to carry out its responsibilities under this Agreement.

It is contemplated that API, at its discretion, may employ covert agents for the furtherance of the Tribe's interest. Because of the physical safety involve in these operations, API, in its sole discretion, may refuse to identify these sources to the client.

SECTION II – COMPENSATION

1. FEES

a. In accordance with this Agreement, API shall invoice the Tribe bi-monthly on an hourly basis for services supplied at the following rates:

Project Manger	$225.00
Senior Consultant	$185.00
Senior Investigator	$150.00
Investigator	$125.00
Paraprofessional	$ 75.00

b. Other specialists and subcontractors as determined by API and approved by the Tribe.

c. Travel time will be billed to the client at the hourly rates set forth above. Notwithstanding the foregoing, no more than eight hours in any one day can be billed to travel, and travel outside of business hours will be billed at one half the standard hourly fee.

2. EXPENSES

In addition to fees, API shall be compensated and reimbursed by the Tribe for all necessary and reasonable expenses including travel expenses, long distance telephone calls and telegraph, telecopier, overnight courier services, postage, printing and/or reproduction of documents and automobile mileage.

Should API require independent legal representation, the Tribe authorizes it up to $3,000.00 per month.

3. PAYMENT DUE DATE AND INTERST

a. The Tribe agrees to make payment of all work in progress and bi-monthly estimates of anticipated costs in advance. Such work in progress and bi-monthly estimates shall be due within five (5) business days of invoice. Any unpaid balance shall bear interest at a rate of one and one-half percent (1 1/2%) per month, eighteen percent annual percentage rate (18% annual interest rate). These invoices and estimates are due in advance.

b. Failure to pay invoice within five (5) business days of receipt constitute a material breach of this Agreement and such voice shall be considered overdue.

c. API shall be entitled to require payment of any initial retainer in the sum of $55,000.00 before commencing work for the Tribe, against which future services will be charged. In the event that said retainer is exhausted, API may require that said funds immediately be replenished before performing any further services. Any unused retainer funds remaining at the end of the engagement shall be returned to the Tribe within ten (10) business days of the termination of the engagement.

SECTION III – ENFORCEMENT

1. VOLUNTARY TERMINATION, BREACH OF AGREEMENT – OPPORTUNITY TO CURE

Each party shall have the right to terminate this agreement at any time without cause on 30 days written notice to the other Party.

Each party shall have the right to terminate for cause on twenty (20) calendar days written notice for

material financial breaches and ten (10) business days written notice for all other material breaches of this Agreement. Upon receipt of such notice, the breaching Party shall have the opportunity to cure or undertake substantially to cure within the applicable period. Upon termination for cause, the non-breaching Party shall be indemnified by the breaching Party for any loss or damage approximately caused by reason of the breach.

2. GOVERNING LAW AND ARBITRATION

a. The interpretation, performance and enforcement of this Agreement shall be governed by the applicable laws of the Tribe, the United States and the State of Iowa.

b. Arbitration

i. The parties shall make efforts to settle through dialogue and negotiation any disputes that may arise out of this Agreement. However, should such efforts fail after thirty (30) days, the dispute shall be submitted to arbitration, which shall be conducted in Des Moines, Iowa, in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be heard before one arbitrator chosen by consensus of the parties. If the parties cannot mutually agree on an arbitrator, the arbitrator shall be chosen in accordance with the Rules of the American Arbitration Association. The decision of the arbitrator shall be final and binding upon the parties.

ii. The arbitrator shall apply the applicable laws of the Tribe (as enacted or amended), the United States and the State of Iowa. The arbitrator shall not have the power to alter, modify, amend, add to or subtract from any term or provision of this

Agreement, nor to rule upon or grant any extension, renewal or continuance of this Agreement. Judgment on the award of the arbitrator may be entered by the Federal District Court for the Northern District of Iowa under the Federal Arbitration Act or Iowa state court pursuant to Iowa law. For this purpose, the Tribe and API hereby irrevocably consent to the jurisdiction over their persons of such courts for such purpose, including to enter judgment on an arbitration award, and waive any defense based on improper venue, inconvenient venues, or lack of personal jurisdiction.

iii. The failure of any party to submit voluntarily to arbitration shall be deemed to be a breach of this Agreement. Provided, that if either party has a good-faith position that a dispute does not arise under this Agreement, that party may file an action in the Federal District Court for the Northern District of Iowa, or the Iowa state courts, to determine whether the dispute is the proper subject of arbitration under this Agreement.

3. ARBITRATION AND LITIGATION COSTS

The arbitrator or Court may order the non-prevailing party to pay for all costs of arbitration and/or litigation including actual attorneys' fees if the arbitrator or Court finds the non-prevailing part acted in bad faith.

SECTION IV – MISCELLANEOUS

1. LEGAL AUTHORITY

Both parties warrant that they have the requisite legal authority to enter into this Agreement and

bind the parties hereto, including any Tribal Resolution or other necessary or appropriate Tribal action.

2. INDEMNIFICATION AND HOLD HARMLESS

a. The Tribe shall indemnify and hold harmless API and API's principals, employees, representatives, agents and subcontractors against all claims, damages, demands, judgments, causes of action of any nature or expenses, including attorneys' fees and litigation costs, arising from any directives, authorizations, acts or omissions of the Tribe; the Tribe shall not indemnify and hold harmless API, its principals, employees, representatives, agents or subcontractors against any claims, damages, demands, judgments, causes of action of any nature or expenses arising from the negligence or intentional misconduct of API, its principals, employees, representatives, agents or subcontractors.

b. If API is named as a party to any suit or other legal action arising out of API's lawful and good faith performance of its obligations under this Agreement, the Tribe agrees to afford all protections available to API as an agent of the Tribal Government, including but not limited to, sovereign immunity and qualified immunity. In addition to the provisions of subsection a., the Tribe also agrees to reimburse API for the time spent by API personnel in defending or reposing to such suit or legal action and attorneys' fees and litigation costs incurred by API in such suit or legal action. The Tribe shall have the right to review such costs before they are incurred.

3. FEDERAL APPROVAL

The Tribe agrees to submit this Agreement within thirty days of execution by both parties, as appropriate for approval if required by Federal law

or Tribal law. In the event that the National Indian Gaming Commission and/or the U.S. Department of Interior determine that any of the Agreement's provisions are contrary to Federal law or otherwise found void and unenforceable, the Tribe and API agree to renegotiate those provisions to bring them into confirming with federal law.

4. TAXATION AND CHANGES IN APPLICABLE TRIBAL LAW

The Tribe agrees that API shall not be subject to any form of Tribal tax, other than nondiscriminatory processing fees and work permits if required, for the work performed under this Agreement. In the event that change(s) in Tribal law (as enacted or amended) make API's further performance of its obligations under this Agreement impossible, or if such change(s) substantially deprive API of the economic benefit of this Agreement, API shall be entitled to be executed from further performance of its obligations and treat such change(s) as a termination by the Tribe without cause.

5. NOTICES

All notices required or authorized to be served shall be served by overnight courier at the following addresses or the most recent address on file:

Attorney's Process and Investigation Services, Inc.
205 Doty Street, Suite 203
Green Bay, WI 54301

Sac & Fox Tribe of the Mississippi In Iowa
c/o Chairman Alex Walker
2982 F Avenue
Montour, IA 50173

Notice shall be effective on the first business day after deposit with the courier on which the courier will guarantee delivery.

6. SEVERABILITY

If any provision or section of this Agreement is invalidated or ineffective or contrary to law, or if the parties agree to cease services under a section, then the remaining provisions of this Agreement shall remain in full force and effect. There shall be substituted for any such provision deemed to be invalid or void or ineffective or contrary to law a suitable provision which, as far as is legally possible, comes nearest to what the parties desired or would have desired according to the sense and purpose of the Agreement.

7. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. The Tribe acknowledges that for this purpose "successors and assigns" shall also include any subsequent Tribal Government of any form, including any Government formed pursuant to any constitution adopted after execution of this Agreement. The parties agree to notify the other party within 30 days in any instance of a successor organization or assignment.

8. NON-WAIVER

Failure by any party to enforce any term or provision of the Agreement in any specific instance shall not constitute a waiver by any such party of any such term or provision in any subsequent instance without any limitation or penalty whatsoever. The rights and remedies herein provided are cumulative

and not exclusive of any right or remedies provided by law.

9. BEST EFFORTS

The parties agree to use their best efforts to carry out this Agreement.

10. HEADINGS

The headings set forth in this Agreement are for convenience only and do not qualify or affect the terms or condition of this Agreement.

11. DISCLAIMER

API is not a law firm and is not retained to provide legal advice to the Tribe. API will conform with all applicable law but the Tribe understands that it should consult it(s) attorneys on legal issues related to this Agreement and services provided thereunder.

12. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and shall supersede all previous representations, understanding and agreements among the parties. No modification of this Agreement shall be of any force or effect unless reduced to writing and signed by the parties, and no modification shall be effectuated by any documents containing terms or conditions at variance with those set forth in this Agreement except as otherwise agreed upon in writing by the parties.

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date and year first above written.

SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA

By: /s/ Alex Walker

Its /s/ Chairman Tribal Council

ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC.

By: /s/ Dennis Nelson

Dennis Nelson, President

OPPOSITION BRIEF

No. 10-613

In The

Supreme Court of the United States

ATTORNEY'S PROCESS AND
INVESTIGATION SERVICES, INC.,

Petitioner,

v.

SAC AND FOX TRIBE OF
THE MISSISSIPPI IN IOWA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner, API, casts itself as an innocent victim of circumstances and tribal and federal judiciaries run wild. It is neither innocent nor a victim. API is an armed mercenary engaged by disgraced, corrupt, former Tribal Chairman, Alex Walker, Jr. to seize by force of arms what democratic elections denied him; control of the Tribe's government and the Tribe's Meskwaki Bingo Casino Hotel (hereinafter "the Casino"). Walker, like a tinhorn dictator of a third world country, refused to accept the democratically expressed will of the Sac and Fox Tribe of the Mississippi in Iowa (Meskwaki) people, and API readily inserted itself into the Tribe's internal relations and self-governance to accomplish Walker's aims.

API contracted with Walker to formulate a plan to achieve his goals. It did so well after Walker was removed as Tribal Chairman, and with full knowledge that his authority to act on behalf of the Tribe was in grave doubt. As is the case with most mercenaries, API preyed on the Tribe's internal strife, using the leadership dispute to enrich itself. It illegally took over $1,000,000.00 of the Tribe's funds for its direct, armed interference in the Tribe's governance and internal relations.

Petitioner argues that it acted under a cloak of federal authority. It states that in 2003 it could enter the Casino, eject what it refers to as "dissidents," take control of the premises, and operate the Casino.

Petitioner wraps its argument around a nucleus of misstated facts and law, which the Tribe addresses in detail below. But central to its argument is the contention that the National Indian Gaming Commission ("NIGC") orders and the BIA's continued recognition of Walker as Tribal Chairman vested Walker with *federal* authority to conduct tribal affairs and retake control of the Casino through any means at hand, including the use of force and, if necessary, violence.

Petitioner seeks to immunize itself from the fact that its conduct falls squarely within the second exception in *Montana v. United States*, 450 U.S. 544 (1981) by arguing that, by virtue of its contract with Walker, the authority these federal actors allegedly conferred on Walker extended to API. Its argument hangs on a slender thread; its contention that the NIGC order closing the Casino was a grant of power to Walker to act within a "federal sphere" of authority, independent of, and apparently even in violation of, limitations imposed by Meskwaki law. API argues that the doctrine of federal supremacy and the BIA's continued recognition of Walker resolved, insofar as the question of tribal court jurisdiction over it is concerned, the Tribe's leadership dispute.

Petitioner's argument fails, for resolution of matters of internal governance are exclusively within the jurisdiction of the Tribe. As this Court has said, such matters implicate tribal sovereign interests at their peak. *Montana*, 450 U.S. 544. The conduct forming the basis for the Tribal Courts' jurisdiction

over API occurred while the Bear Council was the Tribe's legitimate governing body, selected through democratic processes consistent with the Tribe's Constitution, elected by an absolute majority of all qualified voters. The Tribe resolved the leadership dispute with its May 22, 2003 election, regardless of whether it took federal authorities nine days, nine months, or nine years to recognize that result. The Tribal Court decisions merely memorialized what was a political and legal reality; only the Tribe could resolve the leadership dispute, and the Tribe did by electing the Bear Council.

API urges this Court to construe the BIA's continued recognition of Walker, taken with the NIGC's orders, as vesting Walker with authority to exercise the Tribe's sovereign powers in all areas involving federal statutes or regulations pertaining to Indian tribes. If the Court rejects Petitioner's contention, as it must be, then Petitioner was not empowered to mount an armed assault on the Tribe's Government Center, its Gaming Commission offices, and Casino.

Consequently, Petitioner now seeks to shift the debate to new issues, apparently hoping its misstatements of the factual record, its selective citation to snippets of this Court's decisions governing application of the *Montana* exceptions, and its tortured reading of the Eighth Circuit's holding, will lead this Court to grant the Petition. Its dishonesty should go unrewarded.

Examination of the record reveals the NIGC orders were never at issue in this litigation, "collaterally

attacked" by the Tribe, or implicated by the decisions below. The contention that the Eighth Circuit's decision "allow[ed] the Tribe and the tribal court to . . . collaterally attack the federal orders by retroactively assigning a dissident council sole authority over the casino," Pet. at 2, is a bald-faced fabrication entirely unsupported by the record. The Tribal Court, as a matter of tribal law, determined the Tribe had resolved its leadership dispute by removing the Walker Council and electing the Bear Council. Therefore, as a matter of *Tribal* law Walker was without authority over the Casino or any other aspect of the Tribe's governance at the time he entered the contract with API.

As discussed at length in the body of this brief, the only real issue the Court must decide is whether the Petitioner presents any compelling reason to grant the Petition. Given that the Eighth Circuit grounded its decision in this Court's precedent, properly respected the Tribal Court's factual findings, and correctly applied the law to those facts, the Petition must be denied.

Petitioner substantially misstates the facts of record, grossly distorts the procedural history, and mischaracterizes the holdings of the courts below. It raises for the first time here issues not preserved below, and fails in its duty of candor to this Court. The legal issues Petitioner discusses are purely hypothetical, divorced from the procedural history and facts of this case, and API presents no compelling reason why this Court should grant the Petition. The

Tribe presents multiple reasons why the Petition must not be granted, and respectfully requests that the Court deny it.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS OF LAW INVOLVED

CONSTITUTION AND BYLAWS OF THE SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA

ARTICLE IV – COMPOSITION AND QUALIFICATIONS OF GOVERNING BODY

Section 2. All members of the Tribal Council must be recognized as persons of honor, law abiding, and of good character. The voting members of the Tribe shall be the sole judge of these qualifications.

ARTICLE X – POWERS OF THE TRIBAL COUNCIL

Section 1. Enumerated Powers. The Tribal Council shall exercise the following rights and powers, subject to any limitations imposed by the constitution or statutes of the United States and to all express limitations upon such rights and powers contained in this Constitution and Bylaws.

. . .

(e) To protect and preserve the property and natural resources of the Tribe.

. . .

(j) To receive, appropriate and expend for public purposes funds coming within the control of the Tribal Council, but no salaries shall be paid to Council members or other tribal officers without the approval of the Tribe.

ARTICLE XII – REFERENDUM AND RECALL

Section 1. Upon a petition signed by not less than thirty per cent of the eligible voters of the Tribe, enumerated at the last general election, the Tribal Council shall call a special election to ratify or reject any action by the Tribal Council or to recall any member of the Tribal Council.

BYLAWS OF THE SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA

ARTICLE I – DUTIES OF OFFICERS

Section 3. The Treasurer of the Tribal Council shall receive, receipt for, deposit, and account for all funds handled through the Tribal Council. No money shall be disbursed without the consent of the Tribal Council and without the signature of the Chief and the Treasurer. The books of the Treasurer shall be open to inspection by members of the Tribe and by the Commissioner of Indian Affairs at all reasonable hours. An audit of accounts shall be made once a year and at such other times as the Tribal Council or Commissioner may require.

ARTICLE III – MEETINGS OF THE TRIBE

Section 1. In addition to meetings in connection with tribal elections, the Tribal Council shall have the

authority to call the Tribe for general meetings. Upon a petition signed by at least 30 per cent of the eligible voters of the Tribe it shall be the duty of the Tribal Council to call a meeting of the Tribe.

Section 2. Thirty per cent of the total number of the eligible voters, enumerated at the last general election of the Tribe shall constitute a tribal quorum.

Section 3. Written notice of all meetings shall be posted in public places at least five days in advance.

STATEMENT OF THE CASE

A. Statement of Facts

In 2002, the Sac and Fox Tribe of the Mississippi in Iowa (the "Tribe") Tribal Council chaired by Alex Walker, Jr. (the "Walker Council") was presented with petitions for recall of all Council members, signed by more than thirty percent of the Tribe's eligible voters. The petitions originated when tribal members discovered the Walker Council was involved in financial improprieties with the general manager of the Meskwaki Bingo Casino Hotel. *API Appeal*[1] (App.

[1] Throughout this brief, the Tribe refers to the Tribal Trial Court order denying API's motion to dismiss *Sac & Fox Tribe of the Mississippi in Iowa v. Attorney's Process and Investigation Services, Inc.*, case no. API-CV-DAMAGES-2005-01 (App. 635), as "*API Trial Court.*" The Tribe refers to the Sac & Fox Tribe of the Mississippi in Iowa Court of Appeals' decision affirming the Trial Court, case no. API-CV-APP-2008-02-124 (Pet. App. 63), as "*API*

(Continued on following page)

647).[2] The Petitions complied with the Article XII, Section 1 of the Constitution and Bylaws of the Sac and Fox Tribe of the Mississippi in Iowa (the "Constitution"), and when the Council accepted them, it had an absolute duty to conduct a special recall election. The Walker Council members violated the Tribe's Constitution and their oaths of office by refusing to hold the special election prior to March 4, 2003. *API Trial Court* (App. 637-38); *API Appeal* (Pet. App. 82a).

In March 2003, the Tribe's Hereditary Chief and the Tribe's members *lawfully* responded to the Walker Council's violation of the Tribe's Constitution by removing it from office and appointing an interim council, chaired by Homer Bear, Jr. (the "Bear Council") to govern until a special election could be held to fill the vacancies created by Walker's removal. *Id.* Walker's removal occurred two months before Petitioner contracted with him. *API Trial Court* (App. 637-38); *API Appeal* (Pet. App. 83a). Interpreting Article IV, Section 2 of the Tribe's Constitution as

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Appeal." The District Court's order staying *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 401 F. Supp. 2d at 954 (N.D. Iowa 2005) is referred to as "*API District Court I*," and the June 18, 2009 order dismissing API's federal court suit against the Tribe (Pet. App. 35a), is referred to as "*API District Court II*." The decision of the Court of Appeals for the Eighth Circuit (Pet. App. 1a), will be referred to as "*API Federal Appeal*."

[2] The Tribe's citations to "App." are to the pages of the Appendix in *API Federal Appeal*. The Tribe's citations to "Pet. App." are to Petitioner's Appendix to this Court.

providing a procedure closely akin to federal impeachment, an absolute majority of eligible voters voted on April 14, 2002, to remove each member of the Walker Council, and on May 22, 2003, the Tribe held a special election for the vacant seats. Walker lost to Bear by a vote of 410 to 6. (App. 639). Consequently, after May 22, 2003, the governing body of the Sac and Fox Tribe was a Tribal Council chaired by Homer Bear, Jr. *API Trial Court* (App. 638); *API Appeal* (Pet. App. 63); API Fed. App. Ct. Br. 3.

On June 16, 2003, Petitioner entered into a consensual contract with Walker (App. 640), under which it took tribal funds without the Tribe's authorization, and tried to overthrow the Tribe's governing body. Petitioner, as Walker's agent, mounted an armed attack on the Tribe's Government Center, Gaming Commission offices, and Casino, all located on reservation land held in trust by the United States for the Tribe. *Attorney's Process and Investigation, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927 (July 7, 2010) (Pet. App. 1a-34a). Petitioner attempted to forcefully expel the constitutionally elected Tribal Council from the Government Center, forcefully install Alex Walker, Jr. as "Chairman," and physically took control of the Tribe's Government Center, Gaming Commission offices, and Casino, *id.*, through an illegal, forcible, Tribal Ct. Compl. ¶15 (Pet. App. 152a), armed, Tribal Ct. Compl. ¶31 (Pet. App. 154a), premeditated, Tribal Ct. Compl. ¶32, *id.*, coordinated, *id.*, trespass into the Tribe's Government Center and Casino, Tribal Ct. Compl. ¶7 (Pet. App. 150a); Def.

Admis. 9, 11 (App. 492-93), attempting a forcible takeover of the Tribe's property and government. As the Eighth Circuit Court of Appeals stated, the facts applicable to the Petition show Petitioner attempted an armed and violent *coup d'etat* on tribal trust land on the Sac and Fox Tribe of the Mississippi in Iowa Reservation. *API Federal Appeal* (Pet. App. 20a, n. 6).

During Petitioner's armed, military-style attack, Petitioner committed assaults, batteries, unlawful imprisonment and other criminal acts. Compl. ¶31; *API Appeal* (Pet. App. 68a-69a). Petitioner broke into secured areas of the Tribe's Casino, and allowed persons who were banned from the Casino for violations of tribal gaming laws, access to those areas as well. Compl. ¶24 (Pet. App. 153a). Petitioner acted in conscious or intentional disregard of, or indifference to the rights of, safety of, or damages to, the Tribe. Compl. ¶34, 37 (Pet. App. 154a).

Between June 16, 2003 and early November 2003, Petitioner took possession of $1,022,171.26 of the Tribe's money. *API Trial Court* (App. 640); *API Appeal* (Pet. App. 68a). The Tribe's Constitution requires authorization from the Tribal Council as a prerequisite to expenditure of tribal funds, Sac & Fox Const. Art. X, §1(j) of the Tribe's Constitution; Bylaws, Art. I, §3, and the signature of the Tribe's Chairman and Treasurer on all checks. Sac & Fox Bylaw Art. I, §3. Neither the Chairman nor the Treasurer of the Bear Council signed any documents

permitting payment of tribal funds to Petitioner. *API Appeal* (Pet. App. 63a).

As part of its armed assault, Petitioner worked in the Tribe's Casino, Tribal Ct. Compl. ¶7 (Pet. App. 150a), and obtained and exercised control over the Casino and, all or nearly all tribal gaming information, tribal Gaming Commission information, and tribal gaming supplies and gaming machine components. Tribal Ct. Compl. ¶10 (Pet. App. 151a); *API Appeal* (Pet. App. 69a).

Petitioner did not submit an application for a gaming license to the Tribe's Gaming Commission, Tribal Ct. Compl. ¶34 (Pet. App. 154a), was not granted a gaming license from the Tribe's Gaming Commission, *id.*, is morally unfit to hold a gaming license, *id.*, and therefore is unfit to work in gaming.

In the Tribal Court proceedings, Petitioner did not dispute the Complaint's factual allegations detailing its conduct on October 1, 2003. Consequently, for purposes of all proceedings in this case, the allegations are treated as proven facts of record. *API Federal Appeal* (Pet. App. 9a). On the facts of record here, Petitioner's conduct fits squarely within the second *Montana* exception.

B. Procedural History

The procedural history required to make an informed judgment on Petitioner's claims commenced in 2003, with the Tribe's leadership dispute. In April

2003, members of the Walker Council filed a suit styled *Sac & Fox Tribe of the Mississippi in Iowa v. Bear*, 258 F. Supp. 2d 938 (N.D. Iowa 2003), asserting they were "recognized" by the United States and therefore had authority to expend tribal funds and control tribal property, to the exclusion of the Bear Council. Like API here, the former Walker Council alleged that its authority derived from continued federal recognition, which gave it authority to enter into contracts and exercise other powers of office conferred to the Tribal Council by the Sac and Fox Tribe of the Mississippi in Iowa Constitution.

The United States District Court for the District of Northern Iowa dismissed Walker's suit, holding that only the Tribe, not the federal courts, could resolve the competing claims to tribal office and competing claims of authority to enter into contracts on behalf of the Tribe. *Id.* The Eighth Circuit affirmed that decision, *Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749 (8th Cir. 2003), and Walker did not seek this Court's review of the decision.

On May 12, 2003, the NIGC ordered the Tribe to temporarily close its Casino. Invoking exceptions to the general rule requiring exhaustion of administrative remedies, the Tribe filed a federal court action seeking to enjoin the NIGC from executing the closure order. Walker intervened in the Tribe's federal court suit, and again asked the federal court to order Bear to vacate government offices and the Casino. The federal court repeated its prior holding, stating

federal actors have no authority to determine a tribe's leaders. The case ended when Walker abandoned his claims.

Walker appealed the NICG Temporary Closure Order. The ALJ ruled against both Walker and the NIGC (Pet. App. 117a, 130a), and Walker appealed to the NIGC (which sits in review of its own orders), asserting the NIGC should modify its closure order to provide that the Casino could reopen if it was in Walker's control. The NIGC rejected Walker's argument. The NIGC held that the Casino could reopen when it was under the control of "a duly elected, federally recognized Tribal Council." Since Walker was never again "duly elected" he never had authority to reopen the Casino, and ultimately the Casino reopened under control of the Tribe's constitutionally elected governing body, *i.e.*, the Council chaired by Homer Bear, Jr.

In January 2004, an "Election Board" appointed by Walker, brought a federal court suit challenging the BIA's formal recognition of the Bear Council. *Sac & Fox Tribe of the Mississippi in Iowa Election Board [sic] v. Bureau of Indian Affairs*, N.D. Iowa case no. C04-1. The federal district court dismissed the suit on the Tribe's motion, the "Election Board" appealed, and the Eighth Circuit again confirmed that it lacked authority to resolve matters involving the Tribe's internal relations and governance. *Sac & Fox Tribe of the Mississippi in Iowa Election Board [sic] v. Bureau of Indian Affairs*, 439 F.3d 832 (8th Cir.

2006). Walker's "Election Board" did not seek this Court's review.

Consequently, by August 2005, when the Tribe filed suit against API in the Tribal Court, the question whether Walker had authority to exercise the Tribe's sovereign powers by committing it to a contract had been presented to the federal district court (Judge Reade presiding in all matters) and the Eighth Circuit repeatedly, all with the same result; federal law and federal actors could not determine Walker's authority – only the Tribe, applying tribal law, could determine his authority.

The Tribe's complaint alleged that API committed multiple intentional torts against the Tribe when it mounted its military style assault at the Tribe's Government Center and Casino. API filed a motion to dismiss for lack of jurisdiction. Through its motion to dismiss, API raised the issue of whether the Tribe was a party to the June 16, 2003, contract, arguing that the BIA's "recognition" of the former Walker Council made the Tribe a party to the contract, the contract required arbitration of claims, and the Tribal Court therefore lacked jurisdiction over API.

After moving to dismiss the Tribal Court suit, but before the Tribal Court ruled, API filed a federal district court suit styled *API v. Sax & Fox Tribe of the Mississippi in Iowa* (N.D. Iowa case no. 05-CV-16). Like Walker had already repeatedly done, API asserted Walker's "federal recognition" meant Walker's authority to act on behalf of the Tribe was a federal law issue. On the Tribe's motion, the federal court

suit was stayed pending exhaustion of Tribal Court remedies on the jurisdictional issues.

The dispute then returned to Tribal Court and API's challenge to Tribal Court jurisdiction was not on the pleadings, for API requested and was granted discovery, limited to jurisdictional issues. API argued *on the facts*, that it had a contract with the Tribe. In support of its motion, API submitted deposition testimony, affidavits, and numerous documents. The Tribal Court held that the Tribe resolved its leadership dispute by removing the Walker Council and electing the Bear Council, that the Tribe had never entered into any agreement with API, and that Petitioner's conduct fell squarely within the Tribal Court's jurisdiction under the second exception articulated in *Montana*, 450 U.S. 544. *API Trial Court* (App. 663).

API appealed to the Tribe's Court of Appeals but (with one inconsequential exception) did not challenge the Trial Court's findings of fact. On December 23, 2008, the Tribal Court of Appeals affirmed the Trial Court's holding that the case came within the jurisdiction of the Sac and Fox Tribe of the Mississippi in Iowa Court under the second *Montana* exception.

After the Tribe's Court of Appeals issued its decision affirming tribal court jurisdiction, API moved to reopen its federal court suit, and in support of that motion API expressly pled that it had completed its Tribal Court challenges to jurisdiction, the Tribe did not resist the motion to reopen, and the federal

district court granted API's motion to reopen. (App. 50-57). The Tribe promptly moved to dismiss the federal court suit. The district court granted the Tribe's motion to dismiss, and API appealed.

On appeal, the Eighth Circuit Court affirmed that only the Tribe could resolve matters of self-governance and internal relations, including its leadership dispute, and accepted the Tribe's determination that after May 22, 2003, the Tribe was governed by the Bear Council, that Walker was entirely without authority to bind the Tribe, and that no contract had been formed between API and the Tribe. It also affirmed that unless API could show clear error, it must accept the factual record from the Tribe's courts. Before the Eighth Circuit API neither contested the factual findings of the Tribe's courts, nor established clear factual error existed, and the Court confirmed that all uncontested allegations of the complaint were therefore proven facts in this procedural posture. *API Federal Appeal* (Pet. App. 16a). The Eighth Circuit rejected Petitioner's argument here: that a "federal sphere" of tribal sovereign authority exists, and that it is conferred by federal actors on a "Chairman" who can exercise the Tribe's sovereign powers within that federal sphere, to the exclusion of the Tribe's chosen Chairman.

Because there was no contract between API and the Tribe, the Court analyzed the Tribe's jurisdiction over API under the line of cases commencing with *Montana*, strictly applying this Court's precedent as guidance. The Court concluded that based upon the

second *Montana* exception, the Tribal Court had jurisdiction over claims stemming from Petitioner's attempt to overthrow the Tribe's governing body on October 1, 2003. The Court remanded to the district court for further consideration of whether the Tribal Court had jurisdiction under the first *Montana* exception. Petitioner sought review by this Court.

REASONS FOR DENYING THE PETITION

Petitioner grossly misstates what this case is about; this case *does not* constitute a collateral attack on federal administrative "orders" of the NIGC and the BIA. First, the letters of the BIA do not constitute "orders"; they represent nothing more than the BIA's acknowledgement that it could not decide the Tribe's internal leadership dispute, and that the Tribe had to resolve the dispute itself.

The NIGC orders were never at issue in this litigation, "collaterally attacked" by the Tribe, or implicated by the decisions below. The contention that the Eighth Circuit's decision "allow[ed] the Tribe and the tribal court to . . . collaterally attack the federal orders by retroactively assigning a dissident council sole authority over the casino," Pet. at 2, is a bald-faced fabrication entirely unsupported by the record. The Tribal Court, as a matter of tribal law, determined the Tribe had resolved its leadership dispute by removing the Walker Council on April 14, 2003, and electing the Bear Council on May 22, 2003.

Therefore, as a matter of *Tribal* law Walker was without authority over the Casino or any other aspect of the Tribe's governance at the time he entered the contract with API, regardless whether federal authorities recognized him as the Tribe's Chairman.

What the record *does* establish is that in the predawn hours of October 1, 2003, API mercenaries armed with batons and at least one handgun, stormed the Tribe's Government Center, which is the seat of the Tribe's government, housing the Tribal Council Chambers, financial offices, and offices of Tribal Operations. It broke into the Tribe's Government Offices, absconded with financial and legal documents, and sought to use physical force to expel the Bear Tribal Council from the Government Center. The Tribe did not authorize API's illegal conduct.

In a carefully orchestrated action, API simultaneously mounted an armed attack on the Tribe's Casino and its Gaming Commission offices. API illegally broke the locks on the Tribe's Gaming Commission offices, entered and occupied them, and removed files and sensitive documents. Tribal and federal law strictly controls access to Gaming Commission premises and documents, as does the Compact between the Sovereign Indian Nation of the Sac and Fox Tribe of the Mississippi in Iowa and the Sovereign State of Iowa to govern Class III Gaming on Indian Lands of the Sac and Fox Tribe of the Mississippi in Iowa. Access is restricted to authorized persons. Sac & Fox Gaming Code §§113101(a); 11-3103(h); 25 U.S.C. §2710(b)(2)(F). API was not a

person authorized to enter Gaming Commission offices, or to possess Gaming Commission files.

Petitioner, accompanied by individuals whose gaming licenses had been revoked by the Gaming Commission, broke into the Security and Surveillance areas of the Casino, and broke down doors to Casino back-of-house and management offices. While illegally in control of these restricted areas of the Casino, Petitioner permitted the former Casino general manager, whose license had been revoked for financial impropriety and who was banned from even entering the Casino, to access and remove sensitive electronic and paper files from management and accounting offices. Access to the Casino back-of-house, including, *inter alia*, Security, Surveillance, financial, casino operations and management offices, is restricted to authorized persons. Sac & Fox Gaming Code §§11-3101(a); 11-3103(h); 11-6202; 25 U.S.C. §2710(b)(2)(F) API was not a person authorized to be in restricted areas of the Casino, and had no authority to permit others such access, particularly those deemed by the Gaming Commission as unfit to engage in gaming. It did not have a Meskwaki gaming license, which, under federal and tribal law, is a prerequisite to entering such areas. Therefore, even if this Court were to slice tribal sovereignty into a federal and a tribal sphere, API was not a person authorized by the NIGC, federal law, and tribal law, to engage in the conduct it did, and that conduct falls squarely within the second *Montana* exception.

I. Petitioner's Contention That Walker's "Federal Sphere" Authority Defeats Tribal Court Jurisdiction Is Unsupported By Law Or The Facts Of This Case.

A bedrock principle of Indian law is that a tribe, not the federal government, determines the tribe's leaders, and that it is through each tribe's unique democratic processes that it determines by whom it will be governed, in whom it will vest the authority to exercise the tribe's inherent sovereign powers. There is no disagreement among the circuit courts on this principle, nor could there be, because the legal rule is firmly established, and circuit court and Interior Board of Indian Appeals ("IBIA") decisions are in accord with one another. *Nero v. Cherokee Nation*, 892 F.2d 1457, 1463 (10th Cir. 1989) (holding there is no federal jurisdiction over tribal leadership dispute); *Wheeler v. Swimmer*, 835 F.2d 259, 262 (10th Cir. 1987) (same); *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983); *Boe v. Ft. Belknap Indian Cmty.*, 642 F.2d 276, 278-80 (9th Cir. 1981); *Wadena v. Acting Minneapolis Area Director*, 30 IBIA 130 (1996).

The Eighth Circuit noted in its opinion below that "Because tribal governance disputes are controlled by tribal law, they fall within the exclusive jurisdiction of tribal institutions, and the BIA's recognition of a member or faction is not binding on a tribe, *API Federal Appeal* (Pet. App. 28a) (internal citations omitted), stating, "We have reaffirmed this rule in relation to the very governance dispute underlying this case." *Id.* Any other result would be an

affront to the democratic principles upon which this Nation is founded and to which it adheres to this day. Yet Petitioner would have this Court create a rule denying Indian people the right to vote for the leaders of their tribe; it would disenfranchise those members of the Tribe who removed Walker and elected Bear, in violation of this Court's precedent.

As these cases uniformly hold, the right of an Indian tribe to decide who will govern it is the very heart of a tribe's single, unitary sovereignty. Yet, Petitioner urges this Court to tear that heart in two, with the exercise of one part of a tribe's sovereignty (that in the nebulous "federal sphere") determined by federal agencies, and the remainder by the tribe.[3] In making this argument, Petitioner grossly misstates what this case is about, calling the results below a collateral attack on federal administrative orders. That argument is pure fantasy.

Nothing about this case constitutes a collateral attack on federal administrative "orders" of the NIGC and the BIA. API's characterization of the Interior Department letters as "orders" is misplaced; they

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[3] It would appear that virtually every act that a tribe might take would come within the "federal sphere" as contemplated by Petitioner. *See generally* 25 U.S.C. (Federal government provides funding and/or oversight for tribal housing, health care, natural resources, probate, water rights, child welfare, social services, courts, police, schools, gaming, public works and other programs), thus accepting Petitioner's argument entails reinstatement of the paternalistic federal role that existed in the past, one which Congress has expressly rejected.

represent nothing more than the BIA's acknowledgement that it lacked any authority to decide the Tribe's internal leadership dispute, because only the Tribe had that authority.[4]

The degree to which Petitioner distorts the nature of this case, and misrepresents the decisions of the courts below, is startling. API failed to convince the courts below that it was cloaked with the authority it contends the NIGC conferred on Walker – authority to exercise force to retake possession of the Casino. As the Eighth Circuit said, "the NIGC actions had neither the purpose nor the legal consequences API ascribes to them. The notice of violation and closure order disclose no intent to empower Walker to employ force by outsiders to retake the casino." (Pet. App. 30a). Because Petitioner's argument was so preposterous, both the tribal and the federal courts rejected the notion that the NIGC's Order somehow vested Walker with authority to act in a "federal sphere" of tribal sovereign power, entirely separated from the Tribe's own internal relations and self-governance, and independent of the strictures of the

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[4] For example, the March 17, 2003 letter quoted with approval an IBIA decision involving the Tribe, which states that the Tribe "has not only the right, but also the responsibility to resolve this [leadership] dispute for itself without further interference from BIA," and concluded, "the BIA lacks authority to involve itself in these matters." (Pet. App. 142a). *See also* (Pet. App. 145a) (acknowledging the leadership dispute, the BIA reiterates that it must refrain from interfering in the matter).

tribal democratic process, because they recognized it would directly intrude on the Tribe's sovereignty.

Before Petitioner unlawfully extracted over $1,000,000.00 of the Tribe's funds in exchange for its efforts to forcibly overthrow the Tribe's lawful and constitutionally elected governing body, the BIA (App. 142a), and the federal courts had applied this well established legal rule to the leadership dispute which existed on the Sac and Fox Tribe of the Mississippi in Iowa Settlement in 2003. *Bear*, 258 F. Supp. 2d 938, aff'd, *Sac & Fox Tribe of the Mississippi in Iowa/ Meskwaki Casino Litig.*, 340 F.3d 749 (8th Cir. 2003).

Further, whether the decisions below constitute a "collateral attack" was never raised by Petitioner as an issue – until it filed its Petition. The issue therefore is not preserved for review by this Court. Contrary to Petitioner's present claims, the Tribe never *claimed*, and the Eighth Circuit never *held* that federal courts are powerless to vindicate the NIGC's orders; in fact, the Federal District Court for the Northern District of Iowa fully vindicated the NIGC orders and closed the Tribe's Casino. *Sac & Fox Tribe of the Mississippi in Iowa v. United States*, 264 F. Supp. 2d 830 (N.D. Iowa 2003). The Eighth Circuit affirmed that decision on appeal. *Meskwaki Casino Litig.*, 340 F.3d 749 (8th Cir. 2003).

Throughout its brief, Petitioner pretends that the Tribe's claims relate solely to Petitioner's actions at the Tribe's Casino, and implies its acts were all committed in public areas of the Casino. It steadfastly

refuses to acknowledge the fact that the Tribe's complaint alleges Petitioner also committed intentional torts at the Government Center, Gaming Commission offices, and restricted areas of the Casino. All of Petitioner's torts were part of their general scheme to overthrow the Tribe's governing body, and *Petitioner simply has no plausible argument that overthrowing a constitutionally and democratically elected tribal governing body is within a federal sphere* and was or could have been lawfully authorized by any federal actor or any removed former tribal officer.

In the proceedings below, Petitioner never raised the doctrine of collateral attack. The Courts below have not analyzed or ruled on this legal issue, and Petitioner cannot raise this new issue in a petition for a writ of certiorari. Because the issue was not directly presented to the Court below, the Court below did not rule on that issue, so there could not possibly be conflict with any other circuit on this issue. Also, any decision on Petitioner's collateral attack argument here would be limited to the narrow, unique, and complex procedural and factual history of this case. This Court has far more important cases to consider than Petitioner's new and factually and legally unsupported claim that the Tribe engaged in an improper collateral attack.

Finally, Petitioner asserts that there will be "broad negative consequences" from the Eighth Circuit's decision holding the Tribal Court had jurisdiction over API. It is actually Petitioner's arguments

regarding a "federal sphere" of tribal authority which would have "broad negative consequences." Accepting API's argument would constitute a diminution of inherent tribal sovereignty on an unprecedented scale. Such a result would overturn the vast majority of this Court's Indian law precedent and violate the doctrine of *stare decisis*. It would contravene the stated policy and purpose of countless statutes governing Indian matters, violate Congress' express intent to promote tribal self-government, usurp authority vested solely in Congress by the United States Constitution, and create catastrophic and debilitating chaos and uncertainty in Indian affairs throughout Indian country. Its policy argument is without merit and presents no grounds upon which to grant the Petition.

II. The Court Of Appeals Properly Stated The Multi-Factor Test For Application Of The *Montana* Exceptions And Properly Applied That Test To The Arguments Which Petitioner Raised And To The Complex Factual And Procedural History Presented To It.

As Petitioner itself admits, this Court has clearly defined the two *Montana* exceptions.

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or

> other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. United States, 450 U.S. 544, 565 (1981) (citations omitted). Since then, the Court has repeatedly reaffirmed these two exceptions. *E.g.*, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S.Ct. 2709, 2724 (2008) (reiterating the validity of both "*Montana* exceptions"); *Nevada v. Hicks*, 533 U.S. 353 (2001) (same); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (same).

Montana is based upon general principles of federal Indian law. American Indian tribes have given up or had taken from them substantial jurisdiction. They have literally given up or had taken the great majority of the lands which are now the United States. But in giving up this land and jurisdiction, they have reserved or retained some jurisdiction, and the federal government's policy is to foster the tribes' active exercise of their retained jurisdiction and sovereign authority. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). As recognized in *Montana*, one of the powers which tribes have retained is the power to exercise jurisdiction over non-Indians who chose to

come onto the Tribe's lands and engage in certain types of conduct which harms the Tribe.

Before even beginning with a discussion of the second *Montana* exception, this Court should take note that since it has moved to the federal courts, Petitioner has taken the position that all of its acts were as Walker's agent. In the Tribal Court, Petitioner never claimed it was acting within the scope of its authority as Walker's agent when it committed those intentional torts and Petitioner instead proceeded under a claim that it was a non-Indian. Petitioner cannot have it both ways: either it committed the acts as Walker's agent (in which case *Montana* does not even apply), or it committed its torts and violated the scope of authority provided to it by Walker (in which case its claim that Walker provided legally sufficient authorization fails on its facts).

Even if Petitioner were a "non-Indian" for *Montana* analysis, the present matter is a paradigm example of the power which the Tribe has retained. The core of the second *Montana* exception is the protection of the Tribe's political integrity and its right to make its own laws and be ruled by them. Here the Tribe made its own laws: it adopted a Constitution which defined how its leaders are elected and which provided processes for removal of corrupt leaders like Walker, and who has the power to enter into contracts on behalf of the Tribe. The Tribe has highly detailed laws regulating entry into the secured areas of the Tribe's Casino and entry into the tribal Gaming Commission offices.

After Walker was removed from tribal office, Petitioner chose to attack the very core of the Tribe's political integrity: it attempted to forcibly return Walker to power. As is obvious, and as every court which has looked at this matter has agreed, Petitioner's conduct fits within the very core purpose of the second *Montana* exception. Petitioner's conduct clearly threatened the political integrity of the Tribe. It tried to depose the constitutionally and democratically elected governing body, a governing body that the majority of tribal members repeatedly declared was suited to hold the office of Tribal Council member. It attempted to do so using force to gain entry to and control of tribal government offices.

Appellant's same conduct clearly threatened the economic security of the Tribe. Appellant tried to take over both the Tribe's Gaming Commission offices (which is to provide independent regulation of the Tribe's gaming) and the Tribe's Casino, the source of funds the Tribe uses to fund health care; education; housing; youth, family and senior services; welfare programs; child protection programs and other services and programs. Its actions in violation of the Indian Gaming Regulatory Act, 25 U.S.C. §§2701-2721, the Gaming Compact between the Tribe and the State of Iowa, the Sac and Fox Gaming Code and regulations, an NIGC closure order, and a federal district court order created a grave risk of further sanctions and closures.

Because this Court has already clearly defined the applicable legal rule and has repeatedly reaffirmed

the existence of that rule, the Eighth Circuit had no difficultly correctly identifying and applying it to the very complex factual and procedural history in this case. Like the Tribal Court and federal district court, it agreed with the Tribe's analysis that the present matter was a paradigm example of a factual scenario under which a tribal court has jurisdiction under the second *Montana* exception.

Given this Court's numerous cases defining the second *Montana* exception, including recent cases, this is not a situation where there is any disagreement in the Circuit Courts of Appeals, and Petitioner does not seriously contend that there is any such disagreement.

The primary issue which Petitioner claims it would present under the second *Montana* exception is its disagreement with the Sac and Fox Tribe of the Mississippi in Iowa Trial Court, Sac and Fox Tribe of the Mississippi in Iowa Appellate Court, federal district court, and federal Court of Appeals' applications of the established legal rule to the complex procedural and factual context of this case. Pet. §II.A.1-4. As Supreme Court Rule 10 states, this Court will rarely grant a petition for a writ of certiorari when the alleged error is misapplication of a properly stated rule of law.

The present matter is clearly not one of those rare cases where the Court should review the alleged misapplication of the established legal rule. As

discussed above, the courts below based their decision upon the very complex and unique procedural history of this long-running case. The decision below is based in part upon *Petitioner's* own strategic decision to invoke Tribal Court jurisdiction to determine whether the Tribe was a party to the contract with Walker and whether Walker had any actual or apparent authority to enter into any contract on behalf of the Tribe; and Petitioner's own decision to ask the Tribal Court to compel arbitration.[5] The Court would also have to analyze the effect of numerous prior tribal, federal court and federal administrative decisions related to the Tribe's 2003 leadership dispute. The Court's decision would not resolve any new issues, and would only provide yet another application of the accepted rule to a unique factual scenario.

A. Petitioner's Conduct Brought It Squarely Within Tribal Court Jurisdiction Under *Montana*.

Petitioner has never been able to make any non-frivolous argument that the Tribal Court lacked

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[5] The present case would not present any legal issue related to arbitration. It is settled law that disputes must be heard by a court with lawful jurisdiction unless the parties have agreed to arbitration. Petitioner is not claiming that the Court should reverse this settled law. Here, Petitioner asked the Tribal Court to determine whether the Tribe had agreed to arbitration, the Tribal Court correctly held that the Tribe had not agreed to arbitration, and Petitioner simply does not like the answer it got to the question it asked.

jurisdiction over the conduct in which Petitioner actually engaged while in the Tribe's Government Center, Casino and Gaming Commission offices, and therefore Petitioner has created several and ever-changing arguments to try to distract the courts from Petitioner's conduct. Petitioner asserts that the federal courts should look at the conduct of some hypothetical person who did not commit intentional torts on tribal trust land against the Tribe with the purpose of forcibly overthrowing the Tribe's constitutionally elected governing body.

Petitioner acknowledges, as it must given this Court's precedent and the uniformity of lower court decisions, that this Court has directed the lower courts to focus on the conduct of a non-Indian party, which is what the courts below did. Petitioner, however, now argues the Eighth Circuit should have considered only Petitioner's conduct fitting within the elements of the tort claims of trespass and conversion. Because this Court's precedents are directly contrary to Petitioner's argument, Petitioner meanders through federal court interpretations of federal statutes related to the federal well-pleaded complaint rule, federal criminal sentencing, and the National Labor Relations Act, and discussion of cases involving negligent torts which do not, as is the case here, involve attempting to overthrow the Tribe's constitutionally elected leadership. Petitioner argues that the Eighth Circuit erred by considering Petitioner's conduct. Petitioner's conduct, which Petitioner euphemistically refers to as the "context" of its torts,

included an attempt to forcibly overthrow a constitutionally elected tribal governing body, on tribal trust land, at the very seat of the tribal government. Unlike any other case before, Petitioner committed intentional torts against the Tribe itself. The federal Court of Appeals properly considered this "context" when it determined that the Tribal Court had jurisdiction.

Petitioner's argument on this issue provides a good example of the procedural and factual complexity of this case, and of Petitioner's inability to construct an argument which is based upon the facts and procedural posture. The Eighth Circuit's discussion of the "context" of the Tribe's claims was the result of API having argued that the federal courts should apply the federal well-pleaded complaint rule when analyzing whether a tribal court has jurisdiction. Petitioner's assertion, that the Court of Appeals reference to the "context" of the Tribe's claims, is without foundation in the law, and must be rejected for a number of reasons.

First, Petitioner did not raise this argument in the Tribal Court or in the federal district court. It raised it for the first time on appeal to the Eighth Circuit. Second, if Petitioner had raised the issue in the Tribal Court, any claimed "defect" in the Tribal Court complaint could have been cured by amendment. Petitioner admitted this in the federal Court of Appeals. API Fed. App. Ct. Br. 23 (noting that Petitioner's argument for "lack of jurisdiction" is based on the current tribal court complaint, acknowledging

that other claims may have been possible). Petitioner argues that the fact that it attempted to violently overthrow the Tribe's elected governing body is irrelevant because the Tribe did not bring a tort claim for attempted *coup d'état*, instead its claims are based upon the more standard torts which Petitioner committed during its attempted *coup*. If, as Petitioner contends, the Tribe was required to plead and prove a claim for attempted *coup d'état*, it clearly could have done so, and amendment, not dismissal, would have been the proper remedy if the issue had been timely raised in the Tribal Court. *Inge v. Rock Financial Corp.*, 281 F.3d 613 (6th Cir. 2002); *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124 (9th Cir. 1992). Third, Petitioner, through its new appellate counsel, asserts that the Tribe's trespass and trade secret claims do not turn on the circumstances of the Tribe's internal leadership dispute. But Petitioner's trial court counsel stated exactly the opposite to both the Tribal Court and the federal district court, asserting that this case turns on whether Walker or Bear was the Tribe's lawful Chairman. Petitioner's own prior position and legal arguments clearly preclude a grant of certiorari upon the grounds Petitioner now advances.

Even if Petitioner had, from the outset of this matter, asserted that the courts should have applied a "categorical approach," Pet. at 23, Petitioner's argument would not provide any reason for granting the Petition. Petitioner's argument is based upon a few words from this Court's cases, taken out of context. From those snippets, Petitioner argues that this

Court is heading toward a "categorical approach" in which the courts do not look at the facts of the case. But this Court's two most recent decisions, *Hicks* and *Plains Commerce Bank* appear to head in the exact opposite direction. Prior to this Court's decision in *Hicks*, most courts and legal scholars believed that the Court categorically held that acts on tribal land came within tribal court jurisdiction. *Hicks* and *Plains Commerce Bank*, collectively held that the *Montana* test is a multi-factor test, with land status being one of the important factors. As shown in *Hicks*, the importance of this one factor can be overcome when all other factors are on the other side. Some courts interpreted *Hicks* to mean that land status was not relevant or not of much importance, and in *Plains Commerce Bank* this Court corrected that misimpression, holding that the status of the land is a very important factor.

Petitioner's attempt to replace *Montana* with a "categorical approach" similar to the federal well-pleaded complaint rule is not supported in law and is inconsistent with the current factual and procedural history. It also is not supported by any lower court decisions. The Court should not grant a writ of certiorari to determine an issue that was not raised below.

B. Petitioner's Minor Arguments In Section II.A.2, 3, And 4 Of Its Petition Are Without Merit.

In section II.A.2 of its Petition, Petition largely repeats its flawed argument from section I of its Petition, arguing that it could attempt to forcibly take over the Tribe's Casino (and *sub silentio* arguing that it could also forcibly overthrow the Tribe's constitutionally elected governing body) because of alleged BIA and NIGC orders. That argument is without merit for the reasons discussed in section II of this Brief.

In Section II.A.3, Petitioner makes the straw man argument that the Court of Appeals held that "the second *Montana* exception was satisfied because of the casino's location on trust land." Plainly the Court of Appeals did no such thing. Consistent with this Court's precedents, including *Hicks* and *Plains Commerce Bank*, the Court of Appeals properly considered the status of the land as *one factor* in its *Montana* analysis. One can always debate whether a lower court gave one factor in a multi-factor test the proper emphasis, but here the parties briefed the Eighth Circuit at length regarding what weight land status was to be given in that Court's analysis. The parties provided the Court of Appeals with detailed analysis of this Court's decisions in *Hicks* and *Plains Commerce Bank*, and other than Petitioner's straw man argument that the Court of Appeals held that land status was dispositive of the jurisdictional issues, Petitioner does not allege any error in the weight

assigned by the Eighth Circuit land status. Petitioner's argument in Section II.A.3 of its Petition is without any merit.

In Section II.A.4 of its Petition, Petitioner alleges that the Court of Appeals equated tribal legislative and adjudicative jurisdiction even though this Court has never equated the two. This Court should not grant a writ of certiorari based upon Petitioner's assertion for multiple reasons. First, it was Petitioner, in the courts below, who equated tribal legislative and adjudicative jurisdiction. Petitioner did so based upon its badly flawed and now abandoned argument that the Tribe did not have jurisdiction to legislate regarding Petitioner's conduct in tribal governmental buildings. *See* API Fed. App. Ct. Br. 13-14 (Petitioner equates the scope of tribal legislative and adjudicatory jurisdiction and states that *Montana* and its progeny applies to both).

Additionally and more important, to the extent the Court of Appeals equated tribal adjudicatory and legislative jurisdiction, any such statement was dicta. Petitioner does not argue that this case turns on any difference between the scope of tribal legislative and adjudicatory jurisdiction.

Finally, even if this Court has never held that a tribe has adjudicatory jurisdiction in every matter over which it has legislative jurisdiction, there is not yet any disagreement in the circuits on the issue, the parties below did not brief the issue at length and the Court of Appeals did not analyze the legal issue

because the issue was not central to its holding. The present case is simply not a vehicle for resolving this small, and nearly theoretical, issue.

Petitioner's new appellate attorneys understand that to get this Court to grant certiorari, they need to be able to present a significant legal issue to the Court. They try to distance their client from their client's prior actions and arguments, and try to twist the Court of Appeals' decision and this Court's own prior decisions to create such an issue. But in the end, they do not even come close to presenting any significant issue. Petitioner understood the risk it was taking when it decided to try to forcibly remove the governing body which it knew had the support of the vast majority of tribal members. This Court need not spend its valuable time considering whether Petitioner can avoid the consequences of its despicable attempt to overthrow a democratically elected tribal government.

III. Because The Court Of Appeals Remanded For Consideration Of Whether The First *Montana* Exception Applied, This Case Cannot Be Or Should Not Be Reviewed By The Court At This Time.

The current posture of this case is that the district court held that the Tribal Court has jurisdiction under the second *Montana* exception, but the district court has not determined whether the Tribal Court would also have jurisdiction under the first

Montana exception. The Court of Appeals affirmed that the Tribal Court has jurisdiction of several of the Tribe's claims under the second *Montana* exception, but the case was remanded to the district court to analyze and issue a determination on the applicability of the first *Montana* exception.

This Court must consider two issues stemming from the fact that the Court of Appeals remanded the case to the district court for further consideration. The first is whether this posture militates against the Court accepting this case at this time. In an opinion respecting denial of a petition for a writ of certiorari, Justice Scalia wrote: "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993). The Court should apply this general rule here, and should deny certiorari. Under the current posture, this Court would only have before it one part of this case, and under every reasonably plausible scenario the case will eventually have to be remanded to the district court for consideration of the applicability of the first *Montana* exception (and as discussed above, the federal court will then have to hold that the Tribal Court had jurisdiction based upon the first *Montana* exception). The Court should decline to hear this case until final judgment has been issued by the courts below.

The second issue is whether the Court can take the case, *i.e.*, is the case ripe for this Court's review. The case is not ripe for review. *Bhd. of Locomotive Firemen and Enginemen v. Bangor & A. R. Co.*, 389

U.S. 327 (1967). In *BLFE*, the district court had enjoined a strike, the union had then gone on strike, and the district court then was asked to consider whether the Union and its president were in contempt of court. The alleged contemnors argued that: 1) the strike injunction was not binding against the alleged contemnors at the time of the alleged contempt; 2) the alleged contemnors were entitled to a jury trial; and 3) the district court had, in effect, granted summary judgment on the contempt claim even though there was a disputed issue of material fact. The district court rejected each of these arguments. The Court of Appeals rejected the first two of these arguments, but remanded for a non-jury hearing to determine whether the alleged contemnors were in fact in contempt. The alleged contemnors then filed a petition for a writ of certiorari, but this Court denied that request, holding "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." Similarly, the present matter is not ripe for review, and this Court therefore should deny the Petition for a Writ of Certiorari.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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IN THE

Supreme Court of the United States

ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC.,

Petitioner,

v.

SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In this case, the Eighth Circuit Court of Appeals held that a tribal court may reject binding final orders of the National Indian Gaming Commission (NIGC) and the Bureau of Indian Affairs (BIA). In the Eighth Circuit now, a tribal court may overrule BIA and NIGC decisions upon concluding that the federal agencies relied on a misunderstanding of tribal law. Thus, as happened here, a tribal court may effectively overturn federal orders related to the control of an Indian casino when it concludes that the federal agencies gave the "wrong" tribal council authority to operate the casino and bind the tribe to casino-related contracts (including casino-related arbitration agreements divesting tribal courts of jurisdiction). Elementary administrative law dictates that a tribal court does not sit in judgment of federal agencies, even when they misinterpret tribal law. And the Eighth Circuit's holding that questions of tribal law are "beyond the purview of the federal agencies" is patently inconsistent with federal law and the decisions of other federal courts and portends severe consequences. See Pet. 14–20.

The Eighth Circuit also held that a tribal court may adjudicate tort claims arising out of a nonmember's effort to help a tribe's federally recognized council regain control of a casino that tribal dissidents illegally seized. The so-called second *Montana* exception allows tribal jurisdiction over nonmember conduct that catastrophically threatens tribal sovereignty. Other courts have held that tribes have little sovereignty in casinos and the land where they sit. And in becoming the first court of appeals to affirm tribal-court jurisdiction under the second *Montana*

exception since this Court honed the exception to stop its misapplication, the Eighth Circuit failed to resolve important open questions, like whether the second *Montana* exception ever allows tribal *adjudicative* (as opposed to *legislative*) jurisdiction. See Pet. 20–32.

The brief in opposition of the Sac and Fox Tribe of the Mississippi in Iowa does not address many conflicts identified in the petition, dismissing them summarily as "minor arguments." Opp'n 35. Nor does the Tribe try to refute the extraordinariness of the Eighth Circuit's holding; instead, it quotes the *original* formulation of the second *Montana* exception, string-cites decisions *rejecting* tribal-court jurisdiction, then calls this case "the paradigm example" of the never-satisfied standard. Opp'n 25–31. Mostly, the Tribe's brief distracts with overheated rhetoric and *ad hominem*. It calls API "despicable" and "morally unfit." Opp'n 11, 37. It accuses API's counsel of "bald-faced fabrication," "gross distort[ion]," and failing their "duty of candor to this Court." Opp'n 4, 17. It labels API's arguments as "preposterous," "pure fantasy," and "frivolous" (notwithstanding the Eighth Circuit's 34-page opinion). Opp'n 21, 22, 30. The Tribe's invective is irrelevant, false, and beyond the pale. Its brief provides no reason why API's petition should not be granted.

I. FURTHER REVIEW BY THIS COURT IS APPROPRIATE.

A. The petition is not interlocutory.

The Tribe erroneously contends that API's petition is premature because "the case was remanded to the district court to analyze and issue a determination on the applicability of the first *Montana* excep-

tion." Opp'n 38. The Eighth Circuit vacated only the portion of the District court judgment affirming tribal-court jurisdiction over the Tribe's *conversion claim*. See App., *infra*, 34a; see also Pet. 32. The remand proceedings will neither confirm nor undo the Eighth Circuit's judgment that the tribal court has jurisdiction over the Tribe's *trespass and trade-secrets claims*. Prevailing on the limited remand will not help API avoid having to litigate those claims in tribal court, notwithstanding the parties' arbitration agreement. Now is the only chance for the Court to review the Eighth Circuit's decision.

Insofar as the Tribe asserts that its trespass and trade-secrets claims satisfy the first *Montana* exception even if they fail the second *Montana* exception, API's petition should nonetheless be granted. That alternative ground is unavailable. The tribal court of appeals based jurisdiction on only the second *Montana* exception, explicitly rejecting the first. App., *infra*, 91a. Neither logic nor precedent permits a federal court to uphold tribal-court jurisdiction on a ground the tribal court spurned. See Pet. 33–34. The Tribe does not disagree; indeed, it does not even argue how or why the first *Montana* exception applies to its trespass and trade-secrets claims. In all events, the Court has recently granted a petition to review an Eighth Circuit decision affirming tribal jurisdiction under only one *Montana* exception and has gone on to resolve the other *Montana* exception on the merits. See *Plains Commerce Bk.* v. *Long*, 128 S. Ct. 2709, 2726–2727 (2008). Given the significant reasons for reviewing this case, the Court can take the same approach here.

B. API's arguments are preserved.

The Tribe does not seriously contend that API waived either of the questions presented. The twin focuses of API's case have constantly been (a) the effect of the BIA and NIGC orders on the Walker Council's authority to bind the Tribe to the June 2003 Agreement and (b) whether the second *Montana* exception applies. Scattered throughout the Tribe's brief are assertions that API has waived subsidiary arguments. Those assertions lack merit.

Twice, the Tribe asserts that "the NIGC orders were never at issue in this litigation." Opp'n 3, 17. Even the Tribe is unconvinced, though, for it also writes that "both the tribal and federal courts rejected the notion that the NIGC's Order somehow vested Walker with authority." Opp'n 22. A scan of the lower-court opinions and briefs confirms that API has not suddenly sprung the three NIGC orders on the Tribe; the Notice of Violation, Temporary Closure Order, and Permanent Closure Order have been at issue since the case began. See App., *infra*, 29a–34a (Eighth Circuit addressing NIGC orders); 60a (District Court acknowledgement of API's arguments); 70a (Tribal Court of Appeals' acknowledgment); see also API's CA8 Opening Br. 7, 26–27, 34, 37–39; API's CA8 Reply Br. 1–3, 16–17.

Next, the Tribe contends that API has not preserved the argument that the tribal courts collaterally attacked the federal orders. Opp'n 3–4, 23–24. That, too, is wrong. Plainly, API has disputed the ability of the Tribe and its courts to contradict and effectively overturn the BIA and NIGC orders. See API's CA8 Opening Br. 37 ("[F]inding the Agreement invalid on account of Walker's lack of tribal authority effectively, and impermissibly, overturns the au-

thoritative federal decisions of the Secretary of the Interior, BIA, and NIGC, which recognized Walker and deemed him the only Tribe member with authority to run the casino. * * * NIGC's decision cannot be gainsaid now because the proper time and place to do so has long since passed.") (citing *Yakus* v. *United States*, 321 U.S. 414, 434 (1944)); API's CA8 Reply Br. 12–14 ("The Tribe contends that the consequences of federal recognition do not matter in this case because its tribal courts have ruled that, from the beginning, the federal government, BIA, and NIGC were wrong to recognize the Walker Council during the 2003 intra-tribal governmental dispute. * * * Tribal courts do not sit in judgment of the federal government and its agencies and cannot, years later, rewrite history to erase a federal recognition decision they disagree with. * * * The time for challenging Walker's federal recognition has long since lapsed.").

The Tribe further accuses API of raising a waived argument *before the Eighth Circuit*—"that the federal courts should apply the well-pleaded complaint rule when analyzing whether a tribal court has jurisdiction." Opp'n 32; see Tribe's CA8 Br. 52–53 (making the same objection below). API has not argued that the well-pleaded complaint rule applies *ex proprio vigore* in tribal courts; instead, API has argued that this Court's approach to analyzing whether tribal-court claims satisfy a *Montana* exception is like both the well-pleaded complaint rule and the categorical approach used to determine whether a State crime is the same as a generic crime in the federal career-criminal laws. See API's SJ Reply Br. 5; API's CA8 Opening Br. 14–17; see also Pet. 23–24 (making the point without referring to the well-pleaded complaint rule). The Eighth Circuit

expressly considered and rejected API's contentions. See App., *infra*, 16a–19a. API's arguments, therefore, are properly before this Court.

II. THE EIGHTH CIRCUIT'S DECISION CONDONES COLLATERAL ATTACKS ON BIA AND NIGC ORDERS BY TRIBAL COURTS.

Throughout 2003, the BIA recognized the Walker Council as the council representing the Tribe (over claims by the competing Bear Council), and the NIGC ruled that the Walker Council had exclusive control over the Tribe's casino. Pet. 6–7. In June 2003, API agreed to provide the Tribe, acting through the Walker Council, with investigative and security services for the casino and to help reopen the casino. Pet. 8. The June 2003 Agreement contains an arbitration clause. *Ibid.* Once the Tribe haled API into tribal court, API argued that the arbitration agreement divested the court of adjudicative jurisdiction. The tribal court of appeals held that the agreement was void *ab initio* because, notwithstanding the on-point BIA and NIGC orders, the Walker Council had no authority to act for the Tribe in casino matters. Pet. 10–11. The agencies picked the wrong council, the Tribe explains, because they failed to see that the Tribe's hereditary chief had exercised inherent powers—not written in the Tribe's federally approved constitution—to remove the Walker Council. Opp'n 8.

The Tribe declares that "[n]othing about this case constitutes a collateral attack on federal administrative 'orders' of the NIGC and the BIA." Opp'n 21. The proof of the pudding is in the eating. The Tribe says that it "resolved the leadership dispute with its May 22, 2003 election, regardless of whether it took

federal authorities nine days, nine months, or nine years to recognize that result." Opp'n 3. Yet one day later, the BIA ruled that "the May 22 special election was not called and held in accordance with tribal law and, therefore, we will not recognize the results of it." App., *infra*, 147a. (That ruling also belies the Tribe's assertion that "the letters of the BIA * * * represent nothing more than the BIA's acknowledgment that it could not decide the Tribe's internal leadership dispute." Opp'n 17.) The Tribe says that "Walker was without authority over the Casino * * * at the time he entered the contract with API, regardless whether [sic] federal authorities recognized him as the Tribe's Chairman." Opp'n 18. Yet the NIGC held "that the Walker Council is the group that can lawfully act on behalf of the Tribe and correct the bases for closure," one of which was that "an unrecognized faction has illegally taken over the tribal government and its gaming operation." App., *infra*, 136a, 140a.[1] If any more proof were needed to show that this case is a collateral attack, the Tribe's statements in its Eighth Circuit brief would put the issue to rest: "the appropriate tribal forum has now resolved the 2003 leadership question and determined that Walker was removed from office in March 2003

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[1] The Tribe writes that "Walker" instituted the NIGC proceedings, implying that Walker appealed for himself only. See Opp'n 13. In fact, the Walker Council appealed for the Tribe; the Bear Council did not. App., *infra*, 133a ("The Respondent Walker Council, on behalf of the Tribe, narrowed the issues in its written submissions * * *."); 120a–130a (discussing improper *ex parte* letters sent by the "Bear Faction"). The Tribe also singles out API for calling the Bear Council "dissidents," Opp'n 2, but that is the label the NIGC used, see App., *infra*, 112a, 126a, 134a, 137a, 139a.

and in a valid, constitutional election held on May 22, 2003, the Bear Council was elected. To the extent [BIA] made any interim determination to the contrary, its predictions are outdated and wrong, and certainly are not binding." Tribe's CA8 Br. 39.

The Tribe assumes that the conflict between its positions and the federal orders does not amount to a collateral attack because tribes and tribal courts are the arbiters of tribal law. See Opp'n 2, 17–18, 20. But given that the BIA and NIGC must interpret tribal law to fulfill their duties—a truth the Eighth Circuit simply got wrong, see Pet. 15–16—the question in this case cannot be answered with that generality. The question is *how* tribes can register disagreement with the agencies' interpretations of tribal law. The answer comes from basic administrative law. Tribes must invoke the protocols Congress enacted for appealing BIA and NIGC decisions—first administratively, then in federal court. Any challenge to the orders giving the Walker Council control over the Tribe's casino should have been appealed immediately, not collaterally attacked years later. See Pet. 15–18.[2]

Ringing the alarm bell, the Tribe warns that API would have "this Court create a rule denying Indian people the right to vote for leaders of their tribe." Opp'n 21. Of course not. See Pet. 18. A federal agency's interpretation of another sovereign's law for purposes of applying federal programs is no more po-

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[2] The Tribe disagrees that the letters communicating the BIA's recognition decisions are technically "orders." See Opp'n 21–22. Orders or not, the underlying decisions were appealable. See Pet. 17.

litically threatening to Indian tribes than to States. See *Pennsylvania* v. *Riley*, 84 F.3d 125, 132 (CA3 1996) (federal agency's classification of a State program under federal law does not prevent the State from "characteriz[ing] its program anyway it pleases" and does not "impinge upon the State's authority to interpret its own laws"). Furthermore, federal Indian agencies must try in good faith to ascertain who best represents a tribe, even during a governmental stalemate. See *Seminole Nation* v. *United States*, 316 U.S. 286, 296–297 (1942); *Calif. Valley Miwok Tribe* v. *United States*, 515 F.3d 1262, 1267–1268 (CADC 2008); see also *Goodface* v. *Grassrope*, 708 F.2d 335, 339 (CA8 1983); *Wheeler* v. *BIA*, 811 F.2d 549, 552–553 (CA10 1987). To hold that tribes cannot unilaterally vitiate federal agencies' recognition decisions, even when a tribe believes one is wrong, is not to deny tribes the power to resolve intramural disputes. Had the Tribe (or the Bear Council) appealed the agency orders at issue in this case and persuaded an appropriate appellate body of its position's correctness, the orders would have been reversed and the Bear Council might have been given control over the casino, *nunc pro tunc*, on May 22, 2003. But no appeals were taken, and the agencies gave the Bear Council prospective authority to operate the casino only after it won a federally approved election in November 2003.

Accordingly, the Court should grant API's petition to consider the Eighth Circuit's significant and dangerous departure from settled administrative-law doctrines.

III. THE EIGHTH CIRCUIT'S *MONTANA* HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS.

Ever searching for an easy out, the Tribe argues (for the first time) that the *Montana* framework does not apply because API became a *de facto* Indian by contracting with the Walker Council. Opp'n 27. The Court has held, however, that *de jure* membership—for instance, being able to vote, hold tribal office, and serve on tribal juries—is the on-off switch for tribal jurisdiction. See *Duro* v. *Reina*, 495 U.S. 676, 688 (1990). Plus, the Tribe's theory makes a hash of the first *Montana* exception for consensual relationships. The lower courts correctly understood that this is a *Montana* case.

Focusing mostly on the merits, *e.g.*, Opp'n 28–29, the Tribe only cursorily responds to the conflicts the Eighth Circuit created.[3] Contrary to this Court's admonition that only *conduct* matters for the *Mon-*

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[3] One of the Tribe's merits arguments deserves a response: The Tribe blames API for underemphasizing allegations that API entered the Tribe's Community Center and nonpublic areas of the casino. Opp'n 23–24. Those allegations do not change the *Montana* analysis, though, because the complaint is clear that API's entries there were related to recovering casino "records." App., *infra*, 150a. Unlike the Tribe's *brief*, the Tribe's *complaint* does not challenge or turn on API's supposed interference with tribal politics. Compare Opp'n 31 (API acted "with the purpose of forcibly overthrowing the Tribe's constitutionally elected governing body") with App., *infra*, 149a (the Tribe brought suit "to cause Defendant to return funds to the Tribe * * * and because Defendant committed torts against the Tribe and harm to tribal real property and to other tribal property on the Settlement").

tana exceptions, the Eighth Circuit held that "*context* is also significant," see Pet. 22–24, and the Tribe attempts to minimize the conflict as "euphemism," Opp'n 31–32. The Tribe does not defend the Eighth Circuit's decision to ignore federal statutes and administrative orders when determining the extent of tribal sovereignty for the second *Montana* exception. See Opp'n 35; see also Pet. 24–27. The Tribe asserts that the Eighth Circuit's consideration of land status (if merely noting status counts as "consideration," see Pet. 28) created no conflict, but the Oklahoma Supreme Court has held that a casino's location on tribal lands should be irrelevant, see *Cossey* v. *Cherokee Nation Enters.*, 212 P.3d 447, 458 (Okla. 2009). Finally, the Tribe erroneously calls the Eighth Circuit's equation of tribal legislative and adjudicative jurisdiction *dictum*, Opp'n 36, for API now must defend itself in tribal court because the Eighth Circuit (unlike this Court) held that the *Montana* framework for tribal legislative jurisdiction governs exercises of tribal adjudicative jurisdiction as well.

CONCLUSION

The Court should grant API's petition for certiorari to correct the Eighth Circuit's errors.

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